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THE
LAW OF EXECUTORS
AND
ADMINISTRATORS.

BY SIR SAMUEL TOLLER, KNIGHT,
LATE ADVOCATE GENERAL AT MADRAS.

WITH CONSIDERABLE ADDITIONS.

BY FRANCIS WHITMARSH, Esq.
OF GRAY'S INN, BARRISTER AT LAW.

THE SECOND AMERICAN, FROM THE FIFTH LONDON EDITION:
WITH NOTES, AND REFERENCES TO AMERICAN AUTHORITIES.

BY THOMAS F. GORDON, Esq.
OF THE PHILADELPHIA BAR.

— Sorte supremā
Permutat Dominos, et cedit in altera jura. HOR.

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EASTERN DISTRICT OF PENNSYLVANIA, to wit:

BE IT REMEMBERED, That on the fifth day of February, in (L. S.) the forty-eighth year of the Independence of the United States of America, A. D. 1824, THOMAS DESILVER, of the said District, hath deposited in this office the Title of a Book, the right whereof he claims as Proprietor, in the words following, to wit:

"The Law of Executors and Administrators. By Sir Samuel Toller, Knight, "late Advocate General at Madras. With considerable additions. By Francis "Whitmarsh, Esq. of Gray's Inn, Barrister at Law. The second American, "from the fifth London edition: with Notes, and references to American autho- "rities. By Thomas F. Gordon, Esq. of the Philadelphia Bar.

" — Sorte supremâ

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In conformity to the Act of the Congress of the United States, intituled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." And also to the Act, entitled, "An Act supplementary to an Act, entitled, 'An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL, *Clerk of the
Eastern District of Pennsylvania.*

ADVERTISEMENT
OF
THE AMERICAN EDITOR.

THE American Editor has endeavoured to give, in the Notes to this Work, an outline of the law, in the several States, relating to wills, to executors and administrators, and to intestates. To give more than an outline would be impossible, even if it were practicable to procure all the statutes of the several States relating to the subject matter of the Work, unless the Editor could also acquire a knowledge of the various modifications which practice has given to the law in all the States. He flatters himself, however, that he has succeeded in presenting to the Profession, a condensed and useful view of the law, relating to, the execution and probate of wills, the granting of letters testamentary and of administration, the power of the executor and administrator over the real estate of the decedent, the application of real and personal assets to the payment of debts, the distribution of real and personal estate, and the

remedies for and against executors and administrators; and that he has added many valuable American authorities in support of the principles laid down in the text.

The American authorities cited will be readily distinguished, throughout the book, by the *italics* in which they are printed, as will also the references in the index, to the notes.

Philadelphia, Feb'y. 10, 1824.

ADVERTISEMENT TO THE FIFTH EDITION.

IN this Edition of "The Law of Executors and Administrators," the same plan has been pursued as in the last, *viz.* to make no alteration in the language of the original Work, and to introduce the variation in the law by way of addition or explanation. The Names of the Cases cited in the Work, and an alphabetical List of them, have been added to the present Edition.

Lincoln's Inn, August, 1822.

PREFACE

TO

THE FIRST EDITION.

THE subject of the following treatise comprehends a great variety of points, in which the public are very generally interested. In the ordinary course of human affairs, almost all persons, at some period of their lives, are called to exercise the office of a personal representative, or to transact business with such as are invested with it. An attempt, therefore, to unfold its nature, to describe its rights, and to point out its duties, as there is no modern work of any reputation which professes exclusively to treat of these topics, will, I persuade myself, be regarded with favour.

The book of the most distinguished merit on this subject, is that which is entitled “The Office, and Duty of Executors;” and which, although it bear the name of Thomas Wentworth, is now generally ascribed to Mr. Justice Dodderidge. It was

first published anonymously in the year 1641 : to the third edition, printed in the same year, was prefixed for the first time the fictitious name I have just mentioned. The eighth edition appeared in 1689, to which Chief Baron Comyns, in his Digest, constantly refers. In 1703, the ninth edition was published, with a supplement by H. Curzon : the twelfth edition was published in 1762, with references by a Gentleman of the Inner Temple ; and in 1774, the thirteenth and last edition, by Mr. Serjeant Wilson.

Of the original work, it is no undue praise to assert, that it is worthy the pen of so learned an author. It is calculated to engage the attention of the reader, and contains very sound principles, and authentic information. At the same time, it must be confessed, that it is often uncouth, and sometimes obscure, in its language ; altogether inartificial in its method ; and of necessity defective in regard to later adjudications ; which at law are numerous and important ; and in equity constitute a new system. It is also silent respecting the office of an administrator. Nor is it much indebted to its several editors. The supplement, as it is called, is a mere collection of cases, without order, and without precision.

Under these circumstances, I was induced to compile the present treatise. The subject appeared to me capable of an arrangement more natural and distinct than any which has hitherto been adopted. Such arrangement I have endeavoured to form, and to preserve. It has also been my object to comprise the multifarious matter, of which I have been treating, within as narrow limits as it would admit; and to express myself at once with brevity and with clearness. The authorities I have stated very fully in the margin, with a view of facilitating farther researches into points of a nature so interesting, and of so perpetual a recurrence. And it will afford me much satisfaction, if I shall have contributed to extend so useful a species of knowledge.



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THE
LAW OF EXECUTORS
AND
ADMINISTRATORS.

BOOK I.

OF THE APPOINTMENT OF EXECUTORS AND
ADMINISTRATORS.

CHAP. I.

OF WILLS AND CODICILS—WHO MAY MAKE THEM—WHO NOT
—HOW THEY ARE ANNULLED OR REVOKED—HOW REPUB-
LISHED.

BEFORE I enter on the subject of this treatise, I shall state some general propositions in regard to wills.

A will, or testament, is defined to be the legal declaration of a party's intentions, which he directs to be performed after his death. ^(a)

A will may relate either to real, or to personal property. In the former case, it is denominated a devise, which is an appointment of a person to take in the nature of a convey-
[2] ance, although fluctuating till the testator's death, and will pass only such estate as he was seised of at the time of making it^(b); the right to devise arising from the stat. 32 Hen. 8. c. 1. which enacts, that persons *having* lands may devise the same. By the statute of frauds and perjuries, 29 Car. 2. c. 3. it shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express directions; and

^(a) 2 Bl. Com. 499, 500.

Swift *v.* Roberts, Amb. 619. Oke *v.*

^(b) 4 Bac. Abr. 242. 2 Bl. Com. 378.
501. Wind *v.* Jckyl, 1 P. Wms. 575,

Heath, 1 Ves. 141. Brydges *v.* Duch.
of Chandos, 2 Ves. jun. 427.

be subscribed in his presence by three or four credible witnesses^(a). [1]

(a) Vide Ellis *v.* Smith, 1 Ves. jun. Wms. 239. and Stonehouse *v.* Evelyn, 11. Broderick *v.* Broderick, 1 P. 3 P. Wms. 254.

[1] The manner of executing last wills and testaments is variously prescribed in the several states, by Statute. In all, wills disposing of real estate are required to be in writing.* In the following states, the attestation of three or more witnesses, as set forth in the text, is necessary, to a will of lands, &c. viz. Vermont, Rhode Island, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Maryland, South Carolina, Alabama, and Mississippi. In Maine, the like formalities are necessary; and in wills of personal as of real estate.

In Pennsylvania and Delaware, two witnesses only are necessary; but two are required, whether the will be of real or personal estate. In Virginia, North Carolina, and Kentucky, Ohio, Indiana, Missouri, Tennessee, and Delaware, two witnesses must attest the devise of real estate, which must be *signed* by the testator, or some other person in his *presence* and by his *direction*, and the witnesses must subscribe also in his presence. In the three first named states, the witnesses are not requisite, if the will be written wholly by the testator. In Indiana, a will of personal or real estate must be sealed. In Illinois, a will of real or personal estate must be *signed* by the testator, and witnessed by *two* or more witnesses in his *presence* and in the *presence of each other*.

In Louisiana, wills of real and personal estate are nuncupative, mystick, or olographic. The nuncupative is authentick or private. The authentick is received by a notary and three witnesses resident in the parish, or five non-residents. The *private* is executed before five witnesses resident in the parish, or seven others. In the country, three witnesses of the parish, or five resident out of it, suffices. The *mystick* will is written by the testator, or some other person by his order, and presented, closed, to a notary and seven witnesses. The notary draws on the cover an act of superscription, to be signed by himself and the witnesses. The *olographic* will is *wholly* written, dated, and signed by the testator. If it be sealed up, he ought to write on the cover, "This is my *olographic* will," and subscribe his name.

Women, males under sixteen, the blind, deaf, dumb, or insane, the infamous, and slaves, cannot be witnesses to a will. Neither can instituted heirs or legatees.

The *authentick codicil* may be received by a notary and two witnesses; the *private codicil* requires five, and the *mystick* demands five, if the testator have signed, and six if he have not signed, the codicil.

Under the foregoing rules, the following judicial decisions have been made.

In Massachusetts, it is not necessary that a seal be annexed to a will. *Avery & al. v. Pixley*, 4 Mass. T. R. 460.

* See, for Pennsylvania, *Rossetter v. Simmons*, 6 Serg. & R. 452.

But the actual signature of the testator in the presence of the three subscribing witnesses, is not required, if he recognise

In Pennsylvania, two witnesses are required in proof of every testamentary writing disposing of real or personal estate. *Lewis v. Maris*, 1 Dall. 278. But it is not necessary that a will should be sealed; nor that all the subscribing witnesses should prove the execution; nor that proof of the will should be made by subscribing witnesses; nor that the will should be subscribed by the witnesses. *Hight v. Wilson*, 1 Dall. 94: nor that the testator should sign it, if drawn pursuant to his special instructions. *Less. of Walmsley v. Read*, 1 Yeates, 87. Though a will of land must regularly be proved by two witnesses, yet circumstances may supply the want of one witness, where they go directly to the immediate act of disposition. *Eyster et al. v. Young*, 3 Yeates, 511. A will to pass lands, though proved out of the state, must be proved by two witnesses, but they need not be subscribing witnesses. *Hylton v. Browne*, C. C. Jan. 1806. MS. Rep. Wharton's Dig. And when the subscribing witness is out of the jurisdiction of the Court, his handwriting may be proven as if he were dead. *Engles et al. v. Benington*, 4 Yeates, 345.

In Virginia, a testator executed his will in due form of law; one of the legatees afterwards died in the life time of the testator; he gave verbal instructions for a new will, and subsequently drew a memorandum (nearly similar to the instructions) all written with his own hand, but in which his name no where appeared. He dying without having executed a new will, the memorandum was established as a good codicil to pass the personal estate. *Cogbill v. Cogbill*, 2 Hen. & Mun. Rep. 467.

In North Carolina, the signing of the testator may be proved by evidence, that he acknowledged it, though the name or signature or handwriting was not before him, and though the paper lay at a distance on the table. *Devisees of Eilbeek v. Granberry & al.* 2 Hayw. R. 233.

The writing of the decedent must appear clearly to be of a testamentary nature, or it will not operate as a will. For where one enclosed securities for debts in an envelope, and endorsed on it, "for R. G." and other securities in another envelope, endorsed "for the heirs of G. P." and such securities so enveloped were found in the possession of the deceased, never having been out of her possession, and without any communication made to any one upon the subject, it was held, that the endorsements were not testamentary, and could not be admitted to probate as a will. *Plumstead's Appeal*, 4 Serg. & R. 545.

So, where A, living in Philadelphia, wrote a letter to a sister in Germany, desiring her to send over her son B, "and if he proved obedient, and followed all his directions, he should be the heir of his whole estate," this is not a will of land in favour of B. *Stein & al. v. North*, 3 Yeates, 324.

Where A executed an instrument under seal, declaring that in consideration of the care and attention shown him by B, during his illness, he acknowledged himself indebted to her, and that his executors or administrators should pay her a certain sum in one year, which instrument was delivered to B: this was ruled to be an obligation, and not a testamentary disposition. *Shields & al. v. Irwin & al.* 3 Yeates, 389.

it to be his signature before them. Nor is it necessary that the three subscribing witnesses should be together present, at the time of the execution. And the attestation of each witness separately is sufficient (^b).

“I A. B. do make this my will,” is equivalent to signature, and if acknowledged before three witnesses, is a good execution within the statute (^c).

If the witnesses to a will, attest the execution of it by the testator in an adjoining room, and the testator, from his situation, can see them attest it, it is a good attestation within the statute. But if the testator be not so situated that he can see them attest the will, it is not a good attestation thereof (^d).

The wife of an acting executor taking no beneficial interest under the will, is a competent attesting witness to prove the execution of it, within the description of a *credible* witness (^e).

(^b) *Westbeech v. Kennedy*, 1 Ves. and Bea. 362.

(^c) *Morison v. Turnour*, 18 Vez. 183.

(^d) *Forrester v. Pigou*, 1 Maul. & Sel. 9.

(^e) *Bettison v. Bromley*, 12 East. 250.

So, where A, who had been brought up in the store of B, and to whom B had given proofs of kindness, deposited in the hands of B, at different times, between the months of January and June 1804, the sum of \$10,000, for which he refused to take receipts, saying that he had mentioned his purpose to B. At one time, he said he should not have been worth a cent, but for B, and that he should leave \$8000 to one of B's children: at another time, he declared, that he meant to place \$10,000 in B's hands, for the proofs of his friendship: and afterwards, that, what he should die possessed of, he meant to leave to B and his children. In the summer of 1805, at which time he was in ill health, he said, that he owed every thing to B, and that in case of his death, *B or his family should be secured, whether he made a will or not.* After his death, a paper was found in his pocket-book, with his signature, in these words, “I acknowledge to be indebted to B in the sum of \$8000, value received of him—Philadelphia, June 15, 1805.” Held, that this paper might be considered as a debt by A to B, and that B, who took out letters of administration, might retain the amount as a debt, but that it was not of a testamentary nature; and if it were, it must be proved before the Register, before the Supreme Court could give it effect. *Toner v. Taggart*, 5 Binn. 549.

A will of personal property, not executed according to the law of the place of which the testator was a domiciled inhabitant at the time of his death, will not pass personal property in a foreign country, although executed according to the laws of that country. *Dessebats v. Berquier*, 1 Binn. 336.

And an executor clothed with a trust to pay debts, and to lay out money for the benefit of the testator's children, and with power to sell freehold lands in fee, but taking no beneficial interest under the will, is a good attesting witness to it (f).

A will, as it respects personal property, is an indefinite disposition of all the testator may be possessed of at his death (g), inclusive of chattel leases, whether they were his at the time of making his will or not (h), and is of two species, written, and nuncupative: if of the former, it may be committed to writing either by the testator himself, or by his directions (i); nor is the affixing of his seal to the instrument, nor the presence of witnesses at its publication, essential to its validity; yet it is safer, and more prudent, and leaves less in the breast of the ecclesiastical judge, if it be not only signed by the testator, but also published in the presence of witnesses (j).

But although the testator's seal, and the attestation to the will, and, under certain circumstances, even his signature, may be omitted, and still it may operate as an available disposition [3] of personal estate (k); yet if, on the omission of either of those solemnities, a fair presumption may be raised of an abandonment of intention on the part of the deceased, or that his intention was merely ambulatory, the instrument shall have no effect. Thus, where the party wrote a paper purporting to be a testamentary disposition of his property, to which a clause of attestation was added, but not filled up, the court thought it reasonable, from the want of witnesses, to infer that he had changed his mind, and pronounced for an intestacy. So, where the party had merely sealed the paper propounded for a will without signing it, from the omission of the signature, the inference and decision were the same. In these and the like cases, the framer of the instrument appears evidently to have contemplated a farther solemnity, as essential to its perfection;

(f) Phipps *v.* Pitcher, 6 Taunt. Rep. 220. 1 Madd. Rep. 144. 1 Root's Rep. 494.

(g) Oke *v.* Heath, 1 Ves. 141. All Soul's Coll. *v.* Codrington, 1 P. Wms. 598. Brydges *v.* Duch. of Chandos, 2 Ves. jun. 427.

(h) Wind *v.* Jekyl, 1 P. Wms. 575.

(i) Huntingdon *v.* Huntingdon, 2 Phill. Rep. 213.

(j) 2 Bl. Com. 501, 502. Godolph. p. 1. c. 21. s. 2. Vide Limberg *v.* Mason, Com. Rep. 451.

(k) Read *v.* Phillips, 2 Phill. Rep. 122.

and such solemnity not having been superadded, and the instrument being left inchoate and imperfect, a change of intention may reasonably be presumed⁽¹⁾. But such presumption may be repelled by evidence, as by showing that the party was suddenly arrested by death, or incapacitated by illness, before the instrument could be conveniently perfected^(m), or by proving his recognition of it *in extremis*, or by circumstances showing he intended it to operate in that form, for the presumption from such an omission that he intended doing something more, is slight, and may be repelled by slight circumstances⁽ⁿ⁾.

By stat. 33 Geo. 3. c. 28. § 14. and 35 Geo. 3. c. 14. § 16, it is enacted, that all persons possessed of any share or interest in the funds or any estate therein may devise the same by will in writing, attested by two or more credible witnesses. But it has been adjudged, that although the same should not be so bequeathed, yet it devolves on the executor in trust for those who are entitled to the personal estate^(o).

With regard to nuncupative wills, the unqualified allowance of them was found productive of the greatest frauds, and it became necessary to subject them to very strict regulations. Accordingly, by the stat. 29 Car. 2. above-mentioned, it is enacted, that no such will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses at the least, who were present at the making thereof (who, by stat. 4 & 5 Ann. c. 16, must be such as are admissible on trials at common law), nor unless it be proved, that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor, unless such nuncupative will were made in the time of the last sickness of the deceased, and in his dwelling-house, or where he had been resident for the space of ten days or more, next

(1) *Mathews v. Warner*, 4 Ves. jun. 186. and 5 Ves. jun. 23. *Griffin's case*, cited in *Mathews v. Warner*, and in *ex-parte Fearon*, 5 Ves. jun. 644. and *Coles v. Trecothick*, 9 Ves. jun. 249. and see *Walker v. Walker*, 1 Merl. Rep. 503.

(m) *Baillie v. Mitchell*, in Prerog. Court, 1805.

(n) *Harris v. Bedford*, 2 Phill. Rep. 177.

(o) *Ripley v. Waterworth*, 7 Ves. jun. 452.

before the making of such will, except where such person was taken sick from home, and died before his return; nor, after six months past after the speaking of the pretended testamentary words, shall any testimony be received to prove any will nuncupative, except the testimony, or the substance thereof, were committed to writing within six days after the making of the said will^(o). [2]

Soldiers in actual military service, and mariners, or seamen at sea, are exempted from the provisions of this act. The former may at this day make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms and solemnities which the law requires in other cases^(p).

(o) See *Miller v. Miller*, 3 P. Wms. (p) 1 Bl. Com. 417. Stat. 29. Car. 2
356. c. 3. s. 23. 5 W. 3. c. 21. s. 6.

[2] The law relative to nuncupative wills, in the several states, is substantially the same as the Stat. 29 Car. 2. The principal variation is in the sum disposable by this species of will, when the directions of the Act are not complied with. This sum is fixed, in Vermont and Missouri, at two hundred dollars; in Massachusetts and Delaware, at fifty pounds; in New York, at seventy-five dollars; in New Jersey, at eighty dollars; in Maryland, at three hundred dollars; in Virginia, at thirty dollars; in North Carolina and Tennessee, at one hundred pounds; in Kentucky, at ten pounds; in Alabama and Maine, at one hundred dollars; in New Hampshire, Ohio, Mississippi, South Carolina, and Georgia, the provisions of the Stat. of Car. 2, on this head, are preserved. In Rhode Island, a nuncupative will is not permitted, unless to a soldier in actual service, or a sailor at sea. Connecticut does not appear to have legislated upon this subject. In Pennsylvania, Delaware, Virginia, North Carolina, Kentucky, Tennessee, and Missouri, two witnesses only are required to the proof of a nuncupative will.

A man on his death-bed, at his own house, and in his proper senses, sent for a neighbour to make his will, who took notes thereof in his presence, and in that of another witness, who was present all the time, and heard the sick man request the first witness to make his will, and direct each note to be taken. A third witness was not present when the first witness began to take notes, but was present afterwards, and heard some of the notes dictated. Two of the witnesses swore that the notes, or most of them, were read to the decedent, but were not positive, that the whole were, nor did the sick man read them himself, but he was then in his proper senses. After the first witness had made a draught from the notes, the decedent was incapable of reading, or hearing it read, being at that time delirious. The notes so taken were established as a nuncupative will. *Mason v. Dunman*, 1 Munf. R. 456.

[5] But, with respect to the latter, this license no longer exists. The perpetual impositions practised on this meritorious and unsuspecting body of men induced the legislature to adopt a new policy, and to divest them of a privilege, which, instead of being beneficial to them, was perverted to purposes the most injurious.

Many salutary regulations were accordingly prescribed by the statutes 26 Geo. 3. c. 63. 32 Geo. 3. c. 34. and 49 Geo. 3. c. 108, in regard to the making and probate of the wills of petty officers and seamen in the king's service, and of non-commis-sioned officers of marines, and marines serving on board a ship in the king's service, since however repealed, and other regulations substituted by the statute 55 Geo. 3. c. 60, but which I shall defer specifying till I treat of probates.

A codicil is a supplement to a will, annexed to it by the testator, and to be taken as part of the same, either for the purpose of explaining, or altering, or of adding to, or subtracting from, his former dispositions^(q).

A codicil may be annexed to the will, either actually or constructively. It may not only be written on the same paper, or affixed to, or folded up with the will, but may be written on a different paper, and deposited in a different place.

A codicil may be annexed either to a devise of lands, or to a will of personal estate. To alter the former, a codicil must [6] by the statute of frauds be in writing, and signed by the devisor, or some other person in his presence, and by his express directions, and be subscribed in his presence by three or four credible witnesses^(r). To a will of personal estate it may be either written or nuncupative, provided, in case of its being the latter, it merely supply an omission in the instrument. Therefore A having disposed of part of his effects by his will in writing, may dispose of the residue by a nuncupative codicil^(s). But by the same statute, as we shall presently see, such codicil shall not operate to repeal, or alter a will. A written

(q) 2 Bl. Com. 500. Swinb. Part 1. Ellis v. Smith, 1 Ves. jun. 11. and s. 5. infr. 15.

(r) Onions v. Tyrer, 1 P. Wms. 344 & note 1. ibid. vid. Doug. 244. note 2.

(s) Com. Dig. Devise (C.) Raym. 334

codicil respecting personal estate is authenticated in the same manner as a will of such property.

In respect to copyholds, they are not within the statute of frauds. A devise of them operates only as a declaration of uses on the surrender to the use of the will: if, therefore, the form required by the surrender, which is usually nothing more than a testamentary declaration in writing, be observed, it is sufficient without any witness: and till that statute required all declarations of trusts to be in writing, even a nuncupative will of copyholds was an effectual declaration of the uses, where the surrender was silent as to the form (t).

[7] But a devise of customary freeholds, where there is no custom to surrender to the use of the will, must be pursuant to the statute (u).

An estate pur autre vie, being freehold, will pass by such a will only, as is so executed (v).

In regard to terms for years, as they fall within the description of personal estate, they may be disposed of by will accordingly, with this distinction: If they are terms not in gross, but vested in trustees to attend the inheritance, they so partake of its nature, that if the owner devise the land generally, the trust of the term will not pass, unless the will be so attested as to pass the inheritance (w). If they are terms in gross of which the testator is possessed, he may transmit them by the same kind of will as any other personalty; yet he cannot create them by will, without observing all the forms essential to a devise of real estate; because the interest, in right of which the testator creates the term, is real property, and the creation of the term is a partial devise of it (x).

(t) Harg. Co. Litt. 114 b. note 3. Tuffnell *v.* Page, 2 Atk. 37. S. C. 2 Barnard, Ch. Rep. 9. Attorney-General *v.* Barnes, 2 Vern. 598. Dormer *v.* Thurland, 2 P. Wms. 510. Harris *v.* Ingledew, 3 P. Wms. 96. Carey *v.* Askew, 2 Bro. Ch. Rep. 58. Church *v.* Mundy, 12 Ves. jun. 429.

(u) Warde *v.* Warde, Amb. 299.

(v) See Walk. Princ. Convey. 22. and Stat. 29 Car. 2. c. 3. s. 12. and 14 Geo. 2. c. 20.

(w) Harg. Co. Litt. 114 b. note 3. Whitchurch *v.* Whitchurch, Gilb. Ca. in Eq. 168. S. C. 2 P. Wms. 236. S. C. 9 Mod. 127. Villiers *v.* Villiers, 2 Atk. 72. Goodright *v.* Sales, 2 Wils. 329. Vid. infr.

(x) Harg. Co. Litt. 114 b. note 3.

If a will give a sum of money originally, and primarily out of land, the instrument is considered as a devise of real estate, and must be executed with the same solemnities, because the charge is regarded in equity as part of the land, since it can be raised only by sale, or disposition of part of it (^y).

[8] Although money covenanted to be laid out in land shall descend as a real estate, and may be devised accordingly, yet he, who is entitled to the fee of the land when purchased, may dispose of it as personal property, under the description of so much money to be laid out in land, by a will, which is not attested by three witnesses (^z).

The statute of frauds has been held not to be applicable to the case of a devise of land in Barbadoes (^a), because acts of parliament passed in England without naming the foreign plantations will not bind them.

A will may be void from the incapacity of the party making it; and secondly, it may be annulled by cancelling, or revoking it (^b).

There are three grounds of incapacity; the want of sufficient legal discretion; the want of liberty or free will; and the criminal conduct of the party (^c). [3]

(y) *Brudenell v. Boughton*, 2 Atk. 272.

(a) *Anon.* 2 P. Wms. 75.

(z) *Lingen v. Sowray*, 1 P. Wms. 172.

(b) 2 Bl. Com. 502.

291. *Edwards v. Countess of Warwick*, 2 P. Wms. 171. S. C. 3 P. Wms. 221. note. S. C. 2 Eq. Ca. Abr. 298.

(c) 2 Bl. Com. 496, 497.

[3] The age of legal discretion for making a devise of real estate, has been fixed at 21 years, by every state in the Union, for males. In Vermont and Maryland females may devise lands at 18 years of age. The age of discretion for bequeathing personal property, remains as at common law, in all the states, except Connecticut, Rhode Island, Virginia, North Carolina, and Missouri. In the first, it is fixed at 17, in the others at 18 years.

If a testator, at the time of dictating his will, have sufficient discretion for that purpose, and be able to recollect, at the time of making his will, the particulars he has dictated, it will be evidence of a sound and disposing mind and memory. *Hathorn & al. v. King's Ex'rs.* 8 Mass. T. R. 371. If a person, placed under guardianship as *non compos mentis*, be restored to his reason, he is capable of making a will, although the letters of guardianship remain unrevoked. *Stone v. Damas*, 12 Mass. T. R. 488.

To the first are subject, by the express provision of the stat. 34 & 35 Hen. 8. c. 5. all infants under the age of twenty-one years in regard to lands (^d). In respect to personal estate, infants under the age of fourteen years, if males, and of twelve years, if females, are incompetent to bequeath the same (^e): After that period their incapacity ceases: although, on the one hand it has been strangely asserted, that an infant of any age, even of four years old, may make a testament of personal prop-
[9] perty (^f); and on the other, he has been denied before eight-

(^d) *Herbert v. Torball*, 1 Sid. 162. Stat. 34 & 35. H. 8. c. 5. s. 14.

(^e) *Off. Ex. 213, 214*. *Harg. Co. Litt.* 89 b. note 6.

(^f) *Perkins* s. 503; but that seems an error of the press for 14. *Vide Harg. Co. Litt.* 89 b. note 6.

The sanity of a testator is presumed, until the contrary appears. The *onus probandi* as to his mental incapacity, lies on the party who alleges the insanity. But if a mental derangement have been proven, it is incumbent on the devisee to show a lucid interval, or the sanity of the testator, at the time of executing the will. *Jackson & Van Dusen v. Van Dusen*, 5 John. Rep. 144. *Less. of Hoge v. Fisher & al.* 1 Peters' Rep. 163. To prove the sanity of his testator, it would seem, the executor is not a witness. *Hayden v. Smith*, 2 Root, 350.

The will being wholly written by the testator himself, affords *prima facie* evidence that he was in his senses, and able to make a will, so that the *onus probandi* lies on those who wish to impugn it: and proof that the testator's intellects were greatly impaired by the use of opium and ardent spirits, and that, in consequence thereof, he was frequently unfit for business, is not sufficient to repel this presumption, without proof, that such was his condition at the time when the writing was executed. *Temple v. Taylor & Temple*, 1 Hen. & Munf. R. 476.

Drunkenness, merely of itself, is no legal exception to the validity of a will, unless it absolutely disables the party from disposing of his estate with intelligence and reason. *Starret v. Douglas*, 2 Yeates, 48. 1 Hen. & Munf. R. 476.

A man has a right, by fair argument and persuasion, to induce another to make a will, and even to make it in his favour. *Millar & al. v. Millar*, 3 Serg. & R. 269.

The declarations of the testator before and at the time of making a will, and afterwards, if so near as to be a part of the *res gestæ*, are admissible, to show fraud in obtaining the will. But not declarations at any distance of time after the will has been executed, especially, where the will has been in the testator's possession. *Smith v. Fenner*, 1 Gall. Rep. 170.

The declarations of the testator as to his intention to alter his will, and being prevailed upon not to do so, are not admissible, to show that the will was fraudulently prevented from being revoked, there being no act or attempt shown to revoke the will. *Ibid.*

teen, to be competent (^g) ; yet this, as a matter of ecclesiastical cognizance, must be determined by the ecclesiastical law, which has prescribed the rule as above stated (^h).

But, if the testator, of whatever age, were not of sufficient capacity, that will invalidate his testament. By the above-mentioned statute of the 34th and 35th *Hen. 8.* a will of lands made by an idiot, or by any person of nonsane memory, is declared void. Persons afflicted with madness, or any other mental disability, idiots, or natural fools, or those whose intellects are destroyed by age, distemper, or drunkenness, are all incapable of making a will of personal estate, during the existence of such disability. In this class also may be ranked those persons, who, having been born deaf, and blind, have ever wanted the common sources of understanding (ⁱ). But a will is not affected by the subsequent insanity of the testator (^k). And if a testator be subject to insanity, a will made during a clear lucid interval will be established (^l).

In respect to the incapacity arising from the want of liberty, or freedom of will, prisoners, captives, and the like, are not by the law of England absolutely disabled to make a testament; but the court has a discretion of judging, whether, from the special circumstances of duress, such act shall be construed involuntary.

A married woman is also precluded, by the aforesaid stat. 34 and 35 *Hen. 8.* from devising lands. Nor has she the power of [10] bequeathing personal estate. Her personal chattels belong absolutely to the husband. He may also dispose of her chattels real, and he shall have them to himself in case he survive; an interest which necessarily precludes her from such an alienation (^m): yet by the license of the husband, she may make a testament, and, on marriage, he frequently covenants with her friends to allow her that privilege (ⁿ). So, where he stipu-

(g) Harg. Co. Litt. 89 b.

90. White *v.* Driver, ib. 84. 1 Dow's Rep. 178.

(h) 2 Bl. Com. 497. Harg. Co. Litt. 89

b. note 6. (m) 2 Bl. Com. 497, 498. 4 Co. 51. 34 & 35 Hen. 8. c. 5. s. 14.

(i) 2 Bl. Com. 497.

(n) Dr. & Stud. D. l. c. 7. 4 Bac. Abr.

(k) 4 Co. 60.

244. Vide Rex *v.* Bettesworth, Stra. 891.

(l) Clerke *v.* Cartwright, 1 Phill. Rep.

lates that personal property shall be enjoyed by the wife separately, it must be so enjoyed with all its incidents, one of which is the power of disposition by a testamentary instrument (^o). And where she has such power over the principal, it extends also to its produce, and accretions (^p). [4]

But where a feme covert, in consequence of such a contract on the part of the husband, makes a writing in the nature of a will, it seems not in a strict legal sense to operate as a will, but as an appointment; yet it is so far testamentary, that it must be proved in the spiritual court, before her legatee shall be entitled (^q).

If the husband be banished for life by act of parliament, the wife is entitled to make a will (^r). So where personal property [11] is given in trust for the sole and separate use of a married

(^o) 4 Bac. Abr. 244. in note, Fettiplace *v.* Gorges, 3 Bro. Ch. Rep. 8. S. C. 1 Ves. jun. 46. 12 Mass. Rep. 525.

(^p) Gore *v.* Knight, 2 Vern. 535. Herbert *v.* Herbert, Prec. Ch. 44. 355.

(^q) Ross *v.* Ewer, 3 Atk. 156. Jenkin *v.* Whitehouse, 1 Burr. 431. Cothay *v.* Sydenham, 2 Bro. Ch. Rep. 392. Stone

v. Forsyth, Dougl. 707. Vide also Cotter *v.* Layer, 2 P. Wms. 624. Duke of Marlborough *v.* Lord Godolphin, 2 Ves. 75. Southby *v.* Stonehouse, ib. 612. 2 Bl. Com. 498. Rex *v.* Bettsworth, Stra. 891.

(^r) 4 Bac. Abr. 244. Countess of Portland *v.* Progers, 2 Vern. 104. 2 Hayw. Rep. 406.

[4] By the covenant of the husband with the wife before marriage, the wife may not only bequeath personal property, but she may devise her real estate. *Barnes's Lessee v. Irwin*, 2 Dall. 199. 1 Yeates, 221.

A *feme covert*, with the assent of her husband, may dispose of money or other chattels by will; because he alone is interested to question her authority. But she cannot devise her lands, even with her husband's assent, so as to bar and exclude her heir; because the heir cannot be disinherited but by some legal conveyance made by her, and the assent of the husband will not make the will effectual for that purpose. *Osgood v. Breed*, 12 Mass. T. R. 525.

If a wife make a will during the life of her husband, and she survive him, but do not republish the will after his death, it cannot be valid and effectual to pass the estate. *Ibid.*

A *feme covert*, entitled, under a marriage settlement, to a sum of money, settled upon her, to her sole and separate use, and after her death without issue, to her next of kin, may, by an instrument freely and voluntarily executed under her hand and seal, direct the whole amount in the hands of the trustee or his assignees to be paid to her husband. *Dallam v. Wampole*, 1 Peters' R. 116.

woman, she may dispose of it by will, without her husband's assent (s).

A feme covert may also make a will of effects, of which she is in possession in *autre droit*, in a representative capacity; for they never can be the property of the husband (t).

The queen consort has a general right to dispose of her personal estate by will, without the consent of her lord (u).

Persons incompetent by their crimes are all traitors, and felons without benefit of clergy, from the time of their conviction and attaignment, or outlawry, which amounts to the same; for then their property is no longer at their own disposal, but is altogether forfeited (v). [5]

In case a traitor, or felon without benefit of clergy, shall die after conviction, and before attaignment, his lands shall pass by his will, but not his goods and chattels; for the former are forfeited only on attaignment, the latter on conviction (w).

Nor shall the will of a *felo de se*, so far as it respects goods and chattels, have any operation; for they are forfeited by the [12] act and manner of his death; but a devise of his lands shall be effectual, for of them no forfeiture is incurred (x). As is also that of a party guilty of felony, not punishable with death, for he forfeits only his goods and chattels (y). And a felon of every description may devise lands held in gavelkind; for lands of this tenure are not forfeited by felony (z).

(s) Fettiplace v. Gorges, 3 Bro. Ch. Rep. 8. S. C. 1 Ves. jun. 46. Tappenden v. Walsh, 1 Phill. Rep. 352.

(t) Off. Ex. 87. Godolph. 1. 10, 11. Vin. Abr. 141.

(u) Harg. Co. Litt. 133.

(v) 2 Bl. Com. 499. 4 Bl. Com. 380, 381. 387. Bac. Abr. tit. Outlawry. 2

Hale, P. C. 205. Godolph. p. 1. c. 12. s. 8.

(w) 4 Bl. Com. 387.

(x) Plowd. 261. Swinb. 106. 4 Bac. Abr. 247. 4 Bl. Com. 386. 3 Inst. 55.

(y) 4 Bl. Com. 97. Co. Litt. 391.

(z) 2 Bl. Com. 84. 4 Bl. Com. 386. Lamb. Peramb. 634.

[5] The forfeiture of estate for crimes, longer than the life of the offender, is abrogated in many, and it is believed in all the states. And a *felo de se* is humanely and universally considered as having been insane at the time of his self-murder, and his relations as entitled to commiseration, not to punishment, for his act. (See the Constitutions of the several states.) His will of chattels as well as of lands is valid, if at the time of making it he were of disposing mind and memory.

Outlaws also, though merely in civil cases, are intestable, in respect to their personal property, while their outlawry subsists; for their goods and chattels are forfeited during that time (^a).

As for persons guilty of other crimes inferior to felony, as usurers, and libellers, they are not precluded from making testaments (^b); nor, as it seems, is a party excommunicated (^c).

An alien, with whose country we are at war, if he have not the king's license to reside here, express, or implied, is, by our law, incapable of making a will; but if he have such license, he, as well as an alien friend, may bequeath his personal estate (^d). They can neither of them acquire any permanent property in land. They may, indeed, hire, or take leases for years of houses for habitation (^e), which chattel interests, it [13] seems, they may dispose of by will (^f): But the stat. 32 Hen. 3. c. 6. s. 13. makes void all leases of houses or shops to an alien artificer, or handicraftsman. And this law, however contrary it may appear to sound policy, and the spirit of commerce, is still in force; but in favour of aliens it has been construed very strictly (^g). [6]

(^a) Fitzh. Abr. tit. Descent, 16. Paine v. Teap, 1 Salk. 109. Sed vid. Shaw v. Cutteris, Cro. Eliz. 851.

(^b) Godolph. p. 1. c. 12.

(^c) Off. Ex. 17.

(^d) 1 Bl. Com. 372. Wells v. Williams, 1 Lutw. 34. 1 Wooddes. 374.

(^e) 1 Bl. Com. 371, 372. 7 Co. Rep. 17. Harg. Co. Litt. 2 b.

(^f) Harg. Co. Litt. 2 b. note 8.

Harg. Co. Litt. 1 Anders. 25.

————— N. Bendl. 36. vid. also, Caroon's case, Cro. Car. 8. Sed vid. Co. Litt. 2 b.

(^g) Harg. Co. Litt. 2 b. note 7. vid. Jevons v. Harridge, 1 Sid. 309. Jevons v. Livemere, 1 Saund. 7. Pilkington v. Peach, 2 Show. 135. Bridgham v. Frontee, 3 Mod. 94. Wells v. Williams, 1 Salk. 46.

[6] In Pennsylvania, Ohio, Illinois, and Louisiana, alien friends may take by devise, whether residents or non-residents. In Indiana, Missouri, and Tennessee, they must be residents of the United States, and have declared their intention to become citizens. In Kentucky, such alien having resided in the state two years, shall, during the continuance of his residence therein after that period, be enabled to hold, receive, and pass any right, title, or interest to any lands or other estate, in the same manner as citizens may lawfully do. In the rest of the states, the common law prevails on this subject.

An alien can purchase real estate, and can hold against all except the Commonwealth, and until office found can convey. *Stone v. Batson*, 7 Mass. T. R. 431. *Sheaf v. O'Neil*, 1 Mass. T. R. 250. *Fox v. Southack et al.* 12 Mass. T. R.

By stat. 5 Geo. 1. c. 27. British artificers going out of the realm to exercise or teach their trades abroad, or exercising their trades in foreign parts, who shall not return within six months, after due warning given them, shall be deemed aliens, and incapable of taking any lands, and shall forfeit all their real and personal estates; consequently, their wills can have no operation here.

Secondly, a will of personal estate, and by the statute of frauds a will of lands, may be annulled by burning, cancelling, tearing, or obliterating the same, by the testator, or in his presence, and by his direction and consent (^h). [7] And a will

(^h) Stat. 29. Car. 2. c. 3. s. 6. *Boudinot v. Bradford*, 2 Dall. 268. *Burns v. Burns*, 4 Serg. & R. 297.

143. 1 Johns. Cas. 399. *Fairfax Devisee v. Hunter's Les.* 7 Cranch, 603. 621. *Craig v. Radford*, 3 Wheaton, 594. 599.

The 6th article of the treaty of peace of 1783, between the United States and Great Britain, completely protected the title of British subjects to lands in the United States, which would have been liable to forfeiture by escheat for the defect of alienage. That article was not meant to be confined to confiscations *jure belli*. *Orr v. Hodgson*, 4 Wheaton, 453. 462. And by the 9th article of the treaty of 1794, which seems to be a stipulation which cannot be dissolved by any subsequent event, British subjects, who then held lands within the United States, might continue to hold them according to the nature and tenure of their estates and titles therein; and might grant, sell, or *devise* the same to whom they would, in like manner as if they were natives. 7 Mass. T. R. 523. *Linslie v. Martin*, 11 Mass. T. R. 454. *Fox v. Southack et al.* 12 Mass. T. R. 143.

In North Carolina, it has been determined that an alien cannot take real estate by devise. 2 Hayw. 104. 108. But in Virginia, if the real estate be converted into personality, pursuant to the will the alien may take. *Commonwealth v. Seldon & Seddon*, 5 Munf. Rep. 160.

[7] These provisions of the Stat. 29 Car. 2. c. 3. § 6. are in force in all the states except those herein enumerated, either by the extension of the Statute, or by the incorporation of the section in the several Acts of Assembly.

In New Hampshire, the 6th section of the Stat. Car. 2. has not been adopted.

In Pennsylvania and Indiana, where the revocation is in writing, it is by the same forms used in the making.

The Illinois Statute declares that no *words spoken* shall revoke or annul any will or codicil in writing, executed in due form of law.

In Alabama, no will in writing, or bequest therein of goods or chattels, shall be revoked by any subsequent will, codicil, or declaration, unless the same be in writing.

of either species may be annulled by an express or implied revocation of it.

Although a testator has made a will irrevocable in the strongest terms, yet he is at liberty to revoke it; for he shall [14] not, by his own act or expressions, alter the disposition of law, so as to make that irrevocable, which is of an opposite nature (ⁱ).

With respect to the revocation of a will by the act of cancelling, it is in itself an equivocal act; and in order to make it a revocation, it must be shown *quo animo* it was cancelled; for, unless that appear, it will be no revocation. As, if A were to throw the ink upon his will instead of the sand, although it might be a complete defacing of the instrument, it would be no cancellation: or, suppose A, having two wills of different dates in his possession, should direct B to cancel the former, and through mistake he should cancel the latter; such an act would be no revocation of the last will; or, suppose A, having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part (^k): or if A, upon a supposition that he had executed a second will, according to the statute of frauds, containing devises of the real estate precisely the same as those in the first, and to the same person, cancel such former will, the devises shall not be revoked, since the cancelling was upon an evident mistake (^l). And where a testator, being angry with one of the devisees in his will, began to tear it with the intention of destroying it; and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a

(ⁱ) 8 Co. 82.

Gilbert, Cowp. 49. 8 Vin. Abr. 146,

pl. 17.

(^k) Hyde v. Hyde, 1 Eq. Ca. Abr. 409.
3 Cha. Rep. 155. S. C. Burtenshaw v.

(^l) Onions v. Tyrer, 1 P. Wms. 343.
345. Burtenshaw v. Gilbert, Cowp. 52.

In Louisiana, a will may be revoked by a subsequent will, or by a codicil, or by any other act received by a notary in presence of *two* witnesses, expressing a change of will.

In Tennessee, no written will shall be revoked or altered by words, unless the words are put in writing in the lifetime of the testator, and read over to him and approved, and the same be proved by two witnesses.

by-stander, who seized his arms, and partly by the entreaties of the devisee, and upon that became calm; and having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured, and that it was no worse; upon the facts, the verdict of a jury in favour of the will, was supported (^l). It is the intention, therefore, that must govern in such cases, and parol evidence is admissible to explain it (^m).

If a will be destroyed during the lifetime of the testator, but without his knowledge, it will be substantiated upon satisfactory proof thereof, and of its contents (ⁿ).

[15] In case there be duplicates of a will, one in the custody of the testator, the other not; and the testator, with an intention to revoke his will, cancels that which is in his custody, it is an effectual cancellation of both (^o).

So a will may be only partially cancelled: therefore, if A devise two estates, Black Acre to B and White Acre to C, and, after the execution of such will, expunges that part which relates to the disposition of White Acre, the devise of Black Acre shall not be revoked by such obliteration (^p).

A residuary bequest was held to be cancelled by striking through with a pencil all the disposing part, leaving only the general description, with notes in pencil in the margin, indicating alteration and a different disposition of certain articles (^q).

Alterations in pencil of a will, are not therefore to be taken as merely deliberative, but are to be considered as equally valid as if made in ink, provided it appear that the deceased intended them to take effect (^r).

A will may be expressly revoked by another will, or by a codicil in writing; either of which, in case it relate to land, must be executed pursuant to the statute of frauds as above

(^l) *Perkes v. Perkes*, 3 Barn. & Ald. 489.

Burr. 2515. S. C. Com. Rep. 451. *Rickards v. Mumford*, 2 Phill. Rep. 123.

(^m) *Burtenshaw v. Gilbert*, Cowp. 53. 4 Serg. & R. 297, 2 Dall. 266.

(^p) See *Sutton v. Sutton*, Cowp. 812. and *Winsor v. Pratt*, 2 Brod. and Bing, 650.

(ⁿ) *Trevelyan v. Trevelyan*, Phill. Rep. 149.

(^q) *Mence v. Mence*, 18 Ves. jun. 348.

(^o) *Burtenshaw v. Gilbert*, Cowp. 54. *Onions v. Tyrer*, 1 P. Wms. 346. S. C. 2 Vern. 742. *Mason v. Limberry*, 4

(^r) *Dickenson v. Dickenson*, 2 Phill. Rep. 173.

stated. Such will of lands may be also revoked by writing other than a will, or codicil; and then such other writing must by the statute be signed by the devisor, in the presence of three or four witnesses declaring the same. The requisition in the statute of the signature by the devisor to such revocation in the presence of three or four witnesses declaring the same, is, according to the sound construction of the statute, applicable merely to such other writing, and not to a will, or codicil of revocation; since the legislature could not intend to require that a will or codicil amounting to a revocation should be executed in one mode, and a will or codicil originally disposing of lands should be executed in another (q).

[16] These provisions of the statute in regard to revocation do not extend to personal estate. A will of personal estate may be revoked by another will, or by a codicil, or other writing authenticated in the same manner as a will of such property (r). But by the same statute no will in writing of personal estate shall be repealed, or altered by parol, or will nuncupative, unless the same be committed to writing in the testator's life, and afterwards read to, and allowed by him, and proved so to be by three witnesses at the least (s).

Devises of customary freeholds, or of terms vested in trustees to attend the inheritance, or of sums of money primarily charged on lands, must, as we have seen, be executed pursuant to the solemnities required by the statute, and, consequently, fall within its provisions in regard to revocation (t).

If a testator, in consequence of fraud, or misinformation, or mistake in regard to a fact, as, for example, the death of a devisee, or legatee, who is living, make a new will, the former instrument shall not be revoked by the latter (u).

[17] It is essential that the second will should expressly revoke, or be clearly inconsistent with the first, in respect to the subject matter of such will; for no subsequent disposition shall

(q) *Ellis v. Smith*, 1 Ves. jun. 11.

(s) *Vid. infr.*

(r) *Vid. Brady v. Cubitt*, Dougl. 35.
Doe v. Pott, ib. 690. n. 2. *Onions v. Tyrer*, 1 P. Wms. 343. *Ellis v. Smith*, 1 Ves. jun. 11.

(t) *Brudenell v. Boughton*, 2 Atk. 272.

(u) *Campbell v. French*, 3 Ves. jun. 321. 5 Serg. & R. 207.

revoke a prior, unless it apply to the same subject (^v). It is also necessary that the second will should be subsisting and effective at the time of the testator's death; if, therefore, in case of a devise of lands, it be not executed according to the statute of frauds, it is not effective, and is as if no second will had existed (^w). So, if the second will be effectually cancelled in the lifetime of the testator, the first will shall operate as if no other had existed; for it is the only will subsisting at the testator's death (^x). But the particular circumstances of the cancellation and the case must be looked to, for in a late case where a second will was mutilated so as to amount to a cancellation, such cancellation was held not to revive the prior will of nearly similar import (^y).

In case a party leave two inconsistent wills of the same date, neither of which can be proved to have been last executed, unless explained by some act of the testator, they are both void for uncertainty, and will let in the heir (^z).

The making of a subsequent codicil does not invalidate the former, unless it appear to be so intended. Codicils, however numerous, may be all effectual (^a).

[18] There are also other species of revocations which I have not mentioned. The statute of frauds extends not to implied revocations, or to such as are in the nature of ademptions.

With respect to implied revocations, they depend altogether on the supposed intention of the party. The law will presume such intention, and allow it to prevail, in case the circumstances of the testator's situation be materially altered. Hence, if, after the making of his will, he marry, and have a child, this is a constructive revocation of the will which he made in a state of celibacy (^b); so marriage, and the birth of a posthumous child,

(^v) *Onions v. Tyrer*, 1 P. Wms. 345. in note. *Harwood v. Goodright*,

Cwmp. 87. S.C. 7 Bro. P.C. 344.

(^w) *Hyde v. Hyde*, 3 Ch. Rep. 155. *Limbery v. Mason*, Com. Rep. 451.

(^x) *Goodright v. Glazier*, 4 Burr. 2512. 2 Dall. 289.

(^y) *Moore v. Moore*, 1 Phill. Rep. 375 and 406. 2 *Yeates*, 170. 2 Dall. 266.

(^z) *Phipps v. Earl of Anglesea*, 5 Bro.

P. C. 45. *Onions v. Tyrer*, 1 P. Wms. 344. note 1.

(^a) *Swinb. Part 1. s. 5. Hitchins v. Basset*, 1 Show. 549. *Willet v. Sandford*, 1 Ves. 187.

(^b) *Lugg v. Lugg*, Ld. Raym. 441. *Cook v. Oakley*, 1 P. Wms. 304. *Sprague v. Stone*, Ambl. 721. and vid. *Christopher v. Christopher*, 4 Burr. 2182. note.

afford the same inference ; or rather in such cases a tacit condition is annexed to the will at the time of making it, that the party did not then intend that it should take effect, if a total change should happen in the situation of the family (^c). But the presumption, like all others, may be rebutted by every sort of evidence (^d).

Yet it seems there is no case in which marriage and the birth of a child have been held to raise an implied revocation, unless there has been a total disposition of the whole estate. In cases of personal property it is always a total disposition, because, by the appointment of an executor, the whole is vested in him (^e).

[19] To raise this presumption of a revocation, both the circumstances of a man's marriage and of the birth of a child must conspire (^f) : neither the subsequent marriage of a man, nor the subsequent birth of a child, shall of *itself* have that effect (^g). [8]

(^c) Lancashire *v.* Lancashire, 5 Term Rep. 49.

Newman, 3 Wils. 516. and 2 Fonbl. 2d edit. 350. note (b) Sed vid. Lancashire *v.* Lancashire, 5 Term Rep. 52. in note.

(^d) Brady *v.* Cubitt, Dougl. 31. See 1 P. Wms. 304. note 4.

(^g) Lancashire *v.* Lancashire, 5 Term Rep. 51. in note. White *v.* Barford, 4 Maul. and Sel. 10.

(^e) Brady *v.* Cubitt, Dougl. 39. Southcot *v.* Watson, 3 Atk. 228.

(^f) Wooddes. 373. vid. Goodtitle *v.*

[8] In the following states, the birth of a posthumous child is by Statute a revocation *pro tanto* of a will. And such child shall inherit the portion of the real and personal estate which would have come to him had his parent died intestate ; viz. Vermont, Maine, Rhode Island, Massachusetts, Pennsylvania, Delaware, Virginia, South Carolina, Kentucky, Alabama, Maryland, New Jersey, New Hampshire, and New York.

In Pennsylvania, marriage or birth of issue amounts to a revocation of a will previously made, but *only so far* as regards the widow or child, or children after born ; although the subsequent issue be the testator's only child. *Coats v. Hughs*, 3 Binn. 498. The law is the same in Missouri.

In Virginia, a will made when the testator had no child living, not providing for or mentioning any child he might have, if at his death he leave a child, or his wife *ensient* of a child which shall be afterwards born, the will shall be revoked during the life of such child, and shall be void, unless the child die without being married and before full age.

In Ohio, a will made when the testator has no child, is rendered void on the birth of a child ; and a child born after the will made in any case (unless ex-

But a will made in favour of children of a first marriage shall not be revoked by a subsequent marriage, and the birth

pressly disinherited) and a child absent and supposed to be dead, succeed to the same share as if the ancestor had died intestate; to raise which the devisees contribute.

Where a second will is destroyed *without more*, the preceding will not having been cancelled is generally speaking *ipso facto* revived. *Lawson v. Morrison*. The mere making of a second, is the revocation of a preceding testament in relation to personal estate. *Ib. 2 Dall. 289.*

A will of lands in writing may be revoked by a parol republication of a former will in writing; and parol proof may be given of the contents of the earlier will, to ascertain whether the two wills are different, if the will itself cannot be found, and the usual ground is laid for introducing secondary evidence. *Havard v. Davis*, 2 Binn. 406.

A executed a will in due form, disposing of the whole of his property; several years afterwards he drew up a writing headed "memorandum of the last will, &c." by which he made a different disposition of the estate, bequeathing the whole of his property and appointing executors, and which paper he showed to B, requesting him to put it in form. B pointed out some apparent inconsistencies, and advised him to apply to counsel. A replied that he believed he would do so, but survived the conversation five months, during which he was in health and capable of transacting business, and then died without having made any alterations in the paper, and having in his possession the former will uncancelled. Held that the paper last executed, being duly proved by two witnesses, was a good will under the law of Pennsylvania, and revoked the former will. *Arndt v. Arndt*, 1 Serg. & R. 256.

But in Maryland, a paper purporting to be a will, not signed by the testator, though in his own handwriting, and his name written at the top, is not a revocation, so far as relates to personal property, of a former will of real and personal estate, duly executed. *Belt v. Belt*, 1 Har. & M'Hen. 409.

A testator made a will in due form of law, to which he afterwards subjoined a codicil; he then made a second will, and annexed a postscript to it, by which "he revoked all former wills," and signed the postscript; the second will was cancelled by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. This paper was carefully preserved by the testator, as also his first will; both of which were found after his death. Held that the postscript to the second will was a substantive revocation of the first will, and that the cancelling of the second will did not necessarily cancel the postscript also, so as to set up the first as the will of the testator. *Bales v. Holman*, 3 Hen. & Mun. 502.

A commission of lunacy against a testator is not a revocation of a will, which he made when of sound mind. *Hughes v. Hughes' Ex.* 2 Munford's Rep. 209.

In Virginia, it has been decided, that a will of personal estate may be revoked by a subsequent will, not written or subscribed by the testator, but which was proved by one witness only to have been prepared by the testator's directions,

of children of such subsequent marriage, the second wife and her children being provided for by settlement (^h).

In case where a testator, a widower, having a son and two daughters, by will gave all his real and personal estates in trust, subject to debts, for those children, and in case of their deaths over, and afterwards married, had a daughter and died; the general principles of this branch of the law are so clearly defined by the Master of the Rolls, that it is thought most useful to introduce his judgment *verbatim*. “Long after it had been settled by decisions of the ecclesiastical court, with the concurrence of common law Judges sitting in the Court of Delegates, that marriage and the birth of a child would amount to a revocation of a will of personal property, it remained a doubt whether such an alteration of circumstances would have the same effect with regard to a will of real estate: but it is now settled, that even a devise of land may be revoked by what Lord Kenyon, in the case of *Doe* on the demise of *Lancashire v. Lancashire*, 5 T. Rep. 58, calls ‘a total change in the situation of the testator’s family.’ What may be deemed such a total change, may be matter of controversy in each new case; but all the cases, in which hitherto wills of land have been set aside upon this doctrine, have been very simple in their circumstances; and such as, when the doctrine was once received, could admit of no doubt with respect to its application. In all of them the will has been that of a person, who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after-born heir to take an estate, disposed of by a will, made before his birth. The condition, implied in those cases, was, that the testator, when he made his will in favour of a stranger or some more remote

(^h) *Ex parte the Earl of Ilchester*, 7 Ves. jun. 348.

corrected by his order, and which he afterwards declared to be his last will. *Glasscock v. Smither*, 1 Call’s Rep. 479.

A will in writing may be revoked by parol; but the words must be a revocation *instanter*. Cameron & Norwood’s Rep. 174. The directing a will to be burnt by the person with whom it was deposited, who refused to do so, but offered to surrender it to the testator for that purpose, is not a revocation. *Ib.*

“ relation, intended that it should not operate if he should have “ an heir of his own body. In this case there is no room for “ the operation of such a condition; as this testator had chil- “ dren at the date of the will, of whom one was his heir appa- “ rent, who was alive at the time of the second marriage, of “ the birth of the children by that marriage, and of the testa- “ tor’s death. Upon no rational principle therefore can this “ testator be supposed to have intended to revoke his will on “ account of the birth of other children; those children not “ deriving any benefit whatsoever from the revocation; which “ would have operated only to let in the eldest son to the whole “ of that estate, which he had by the will divided between that “ eldest son and the other children of the first marriage. It is “ true, the ecclesiastical court has decided, that the will was “ revoked as to the personal estate; that is, in opposition to “ their decision in *Thompson v. Sheppard* in 1779; where, un- “ der circumstances precisely the same, the will was held not “ revoked even as to the personal estate. There was in that “ case an appeal to the Delegates, but it was not prosecuted. “ The revocation however as to the personal estate had an ef- “ fect, which might perhaps have been intended by the testator “ —that of letting in the after-born children with those of the “ first marriage: but the principle of the decision has no bear- “ ing whatsoever upon the devise of the real estate; which, ac- “ cording to my opinion, stands unrevoked (ⁱ).”

In a late most important case, where a man made a will, providing for all his children then living, and with which his wife was ensient, the birth of other children, combined with circumstances of large increase of property, and declarations of the testator, were held to revoke his will (^k).

If a single woman make a will, her subsequent marriage shall alone revoke it (^l); nor shall it be revived by the death of her husband (^m).

(ⁱ) *Sheath v. York*, 1 Ves. & Bea. 390. and see *Hollway v. Clarke*, 1 Phill. Rep. 339. *Emerson v. Boville*, ibid. 342.

(^k) *Johnston v. Johnston*, 1 Phill. Rep. 445.

(^l) 4 Co. 60. *Cotter v. Layer*, 2 P. Wms. 624. *Hodson v. Lloyd*, 2 Bro. C. Ca. 534.

(^m) *Doe v. Staple*, 2 Term Rep. 695.

There are also revocations (ⁿ) in the nature of admissions. If the testator do any act inconsistent with the operation of the will, such act shall amount to a revocation of it. To render a cancellation effectual, we have seen, the intention of the testator must in all cases concur, and an implied revocation is founded entirely on the intention : but the species of revocation I have just mentioned is altogether independent of intention (^o), and may prevail even in opposition to it. It is true that before the [20] statute of frauds the intention was the criterion. It was therefore held, that where A having devised lands to B in fee, granted to B a lease of the same lands, to commence after A's death, such act revoked the disposition of the will, on the ground that the lease clearly implied an alteration of intention, namely, to give the devisee a less estate (^p). But since the statute I conceive such a case would be differently decided : The lease effectuating no alienation of the subject matter of the devise, would not be held to defeat the operation of the will ; nor if A were to devise lands to B in fee, and afterwards mortgage to him the same lands for a term of years, would the devise be revoked (^q). On the same principle, since the statute of frauds, the subsequent act of the devisor must be complete to produce such effect. Before the statute, a deed of feoffment without livery, a bargain and sale without enrolment, a grant of reversion without attornment, were held to revoke a will of lands, on the ground, that although these acts were themselves imperfect, yet they equally indicated a change of the devisor's intention ; but since the statute, I apprehend that acts thus incomplete, not amounting to an alienation of the estate inconsistent with such will, would not be more effectual to revoke it than a subsequent will imperfectly executed (^r).

And altogether to defeat the disposition by the will, there must be a subsequent conveyance of the whole estate. It must [21] be commensurate with the appointment which the will has

(ⁿ) *Brudenell v. Boughton*, 2 Atk. 272.
(^o) *Abury v. Miller*, 2 Atk. 598. *Par-*

sons v. Freeman, 3 Atk. 745. inaccurate ; and see *Baxter v. Dyer*, 5 Ves. jun. 656. and *Peach v. Phillips*, ibid. 664.

(^p) *Coke v. Bullock*, Cro. Jac. 49.

(^q) As to the subsequent case of *Hark-*
ness v. Bailey, Prec. in Ch. 514. it is

Sed vid. ex parte the Earl of Il-
chester, 7 Ves. jun. 378.

made. If the inconsistency between the disposition by the will, and the subsequent disposition, be merely partial, the revocation shall not extend beyond such inconsistency. As, where A devises an absolute estate in fee to B, and afterwards, by a subsequent devise, gives him only an estate tail in the same land, it is a revocation merely to the extent of the difference between an estate tail, and an estate in fee^(r). So, if A devise all his real estate to B, and afterwards, on B's marriage, settle upon her a part of such estate, in respect to the remaining part of it the will shall operate^(s). So, if A devise lands in fee to B, and afterwards grant a lease to C for a term of years to commence after A's death, or mortgage the lands to C for a term of years or in fee, the devise of the fee, subject to the lease^(t) or mortgage^(u), either of which is merely the introduction of an incumbrance, shall continue good. If the owner of an unqualified equitable fee devise it by his will, and afterwards the unqualified legal fee be conveyed to him, the will is not thereby revoked, because such conveyance was incident to the equitable fee devised. But if he afterwards take a qualified conveyance of the legal fee, for the purpose of preventing dower, it is a revocation of the will, being a change in the quality of the estate, and not incident to the equitable fee^(v).

A surrender made by a testator of copyholds to the uses of his marriage settlement, is not a total revocation of a surrender made to the use of his will, and a devise of such copyholds, but the devisee takes the copyhold subject to the charge created by the marriage settlement^(w).

Where a testator devised real and personal estate to certain uses, and afterwards by deed conveyed it to the same uses until marriage, and then to new uses, providing for his intended wife and the issue of the marriage, and after the deed, and before marriage, by codicil duly attested, and directed to be annexed to his will, he imposed a forfeiture in case of his wife being disturbed, and after the codicil married: it was held that

^(r) Harwood v. Goodright, Cowp. 90.

^(s) Clarke v. Berkeley, 1 Eq. Ca. Abr. 412. S. C. 2 Vern. 720.

^(t) Coke v. Bullock, Cro. Jac. 49. Roll. Abrid. 616.

^(u) Harkness v. Bailey, Prec. in Ch. 515. Tucker v. Thurston, 17 Ves. 134.

^(v) Ward v. Moore, 4 Madd. Rep. 368.

^(w) Vawser v. Jeffery, 3 Barn. & Ald. 462. and 2 Swans. Rep. 268.

the settlement revoked the will, and that the will was republished by the codicil; that the new uses springing on the marriage did not revoke the codicil, nor did the marriage, and birth of children, as being contemplated by the will^(w).

I have already stated that this species of revocation may operate even in opposition to the devisor's intention^(x). Hence if A, after making his will, suffer a recovery, levy a fine, or convey his estate by lease or release, the devise will be revoked, although the use result, or be limited to A himself^(y). So, if [22] A devise lands, and afterwards make a feoffment to the use of his will^(z), or if A covenant to levy a fine to the use of such person as he shall name by his will, then makes his will and devises his land, and afterwards levies a fine in performance of his covenant^(a); or if A, seised in fee, devise an estate in fee to B, and by a conveyance takes back an estate from B in fee^(b); or, if A, seised in fee, thinking he has only an estate tail, suffer a recovery in order to confirm his will^(c), all these cases amount to a revocation. So, if A be disseised, after making his will, and die before re-entry, the disseisin will have the same effect^(d).

These are the necessary consequences flowing from the nature of a devise of lands as before defined. It is not an institution of an heir: It is in the nature of a conveyance: It is an appointment of the specific estate, to be completed by a subsequent event, namely, the death of the devisor. The devisor must therefore continue to have it unaltered, and without any new modification, to the time of his death, when the devise is to take effect. If, therefore, any new disposition be made subsequently to the will, or, in other words, any new conveyance

^(w) Jackson *v.* Hurlock, 2 Eden's Rep. 263.

^(x) Banks *v.* Sutton, 2 P. Wms. 718. Sparrow *v.* Hardcastle, 3 Atk. 803. 1 Roll. Abr. 614. Swift *v.* Roberts, Ambl. 618. Darley *v.* Darley, ib. 653. and Dick. Rep. 397. S.C.

^(y) Parsons *v.* Freeman, 3 Atk. 741. Darley *v.* Darley, Ambl. 653. Parker *v.* Biscoe, 3 Moore. 24.

^(z) Sparrow *v.* Hardcastle, 3 Atk.

804. Swift *v.* Roberts, Ambl. 618.

^(a) Swift *v.* Roberts, Ambl. 610.

^(b) Parsons *v.* Freeman, 3 Atk. 742. Bridges *v.* Duchess of Chandos, 2 Ves. jun. 431.

^(c) Sparrow *v.* Hardcastle, 3 Atk. 803. See also Darley *v.* Darley, Ambl. 653. and Dick. Rep. 397. S.C.

^(d) 1 Roll. Abr. 616. Attorney-General *v.* Vigor, 8 Ves. jun. 282.

of that which had been conveyed by the will, it shall defeat the will. It implies an alteration, and the rule, that the estate must pass by the first complete conveyance, becomes applicable^(e).

[23] On the same principle, where A, seised of a lease for lives, devises it, and afterwards renews, the renewal of the lease is a revocation of the will as to this particular; for by the surrender of the former lease, the testator puts it out of him, divests himself of the whole interest, and it is gone, so that there be nothing left for the devise to work upon, the will must fail^(f). And the law is the same in regard to chattel leases, if specially bequeathed^(g); but not otherwise^(h).

So, if A specifically bequeath to B a gold cup, under a particular description, and afterwards sell, or give it away, and then buy another gold cup, such newly purchased cup shall not pass to B by the will, inasmuch as the identical subject is gone⁽ⁱ⁾.

If the subsequent conveyance be procured by fraud, it shall have no effect^(k).

Such are the principles of law in regard to revocations. Equity also proceeds on the same principles; and, following the law, admits no revocation that would not be a revocation on legal grounds. Therefore if A, having an equitable estate, make his will, and then execute a conveyance, and dispose of it, or declare the uses to himself, that will be a revocation, in [24] case it would so operate at law on a legal estate^(l).

But still this revocation is bounded by the rule of law; and

(e) *Swift v. Roberts*, Ambl. 618. *Bridges v. Duchess of Chandos*, 2 Ves. jun.

426. *Sparrow v. Hardcastle*, 3 Atk. 803. *Harwood v. Goodright*, Cowp. 90.

Hogan v. Jackson, ib. 305.

(f) *Marwood v. Turner*, 3 P. Wms. 170, 171.

(g) *Abney v. Miller*, 2 Atk. 527. *Carte v. Carte*, 3 Atk. 174. *Stirling v. Li-*

diard, 3 Atk. 199. *Rudstone v. An-*

derson, 9 Ves. 418. *Attorney-General v. Downing*, Ambl. 571. *Hone v. Med-*

craft, 1 Bro. C. C. 261. *Coppin v.*

Fernyhough, 2 Bro. C. C. 291. See 1 P. Wms. 597.

(h) *Bowers v. Littlewood*, 1 P. Wms. 595.

(i) Off. Ex. 23. vid. *Abney v. Miller*, 2 Atk. 599.

(k) *Clymer v. Littler*, 3 Burr. 1244. *Hawes v. Wyatt*, 3 Bro. C. C. 156. S. C. 2 Cox. Rep. 263.

(l) *Brydges v. Duchess of Chandos*, 2 Ves. jun. 428. *Rawlins v. Burgis*, 2 Ves. & Bea. 381.

therefore, if the conveyance be of part only, and for a partial purpose, it shall be a revocation only *pro tanto* (^m).

In cases of mortgage, if, as I have already stated, A. devise to B in fee, and afterwards mortgage to C for a term of years, that at law is no revocation of the fee. If it be a mortgage in fee, a court of law has no concern with the disposition of the equity of redemption. It takes no notice of such an interest, but considering the land only as a pledge for a debt, which is the personal estate of the mortgagee, of necessity holds, that the land to all other purposes remains unaltered in the mortgagor. It merely decrees the redemption to that person, who would have been entitled if the mortgage had never existed, that is, the devisee. Being discharged, it is as if it had never existed. As, in cases at law, if the mortgage be for a term of years, it is no revocation, it would be incongruous that it should be so in equity in the case of a mortgage in fee, where the act done gives as at law nothing more than a pledge for a debt to the mortgagee, which is personal estate, and would devolve upon his executors (ⁿ). So, in the case of a conveyance for payment of debts, the surplus resulting or being expressly [25] reserved to the party making it, and his heirs, it is precisely the same case as that of a mortgage. There is no distinction between a general charge for debts, and a charge for a particular debt. The alteration of the estate in substance extends no further than to let in the particular purpose; and whether definite for a particular debt, or indefinite for all debts, makes no difference (^o). Therefore, these cases have been determined in strict analogy to the law.

In like manner, if A have an equitable interest in fee in an estate, and afterwards take a conveyance of the legal estate to the same uses: as, where A enters into articles of agreement with B to buy lands of him, and afterwards devises those lands, and then B conveys the same pursuant to the articles, this is no revocation in equity; for, the equitable right which A has to the

(^m) *Brydges v. Duchess of Chandos*, 2 Ves. jun. 428.

(ⁿ) 2 Ves. jun. 428. Ambl. 31.

(^o) *Brydges v. Duchess of Chandos*,

2 Ves. jun. 428. See also *Williams v. Owen*, ibid. 595. and *Cave v. Holland*, ibid. 603. in note, and 3 Ves.

jun. 650.

lands to be purchased shall pass by the will, and his heir at law be a trustee for the devisee (^p).

In the case of a recovery after a will, though in terms showing clearly no intention to revoke, a recovery suffered after a will is as much a revocation in a court of equity, as it is in a court of law (^q). So, if A, after making his will, covenant for a valuable consideration to convey the devised estate to B; al- [26] though A die before the contract is executed, yet the covenant shall revoke the will, on the equitable principle, that what ought to be done is supposed to be done: therefore, as at law, if the covenant had been performed in the testator's lifetime, it would have amounted to a revocation, the covenant by analogy shall have the same effect in equity (^r); or rather it constitutes the devisee a trustee to perform the contract for the benefit of the executor.

In regard to the republication of wills, since the statute no devise of lands can be republished, unless it be re-executed by the devisor with the same solemnities with which it was executed at first; or by a codicil executed in the same manner, in terms ratifying, confirming, or republishing the will (^s), or expressive without being restricted to any precise form of words (^t), of his intention that the will should be considered as bearing the same date with the codicil (^u). A codicil so executed, although it relate merely to personal estate, yet, if it contain a general clause of confirmation of the will, or sufficiently indicate an intention that the will shall be deemed of the same date with the codicil, shall have the same effect (^v). In case the will be republished by a codicil, the will and codicil are considered in point of law as constituting but one instrument (^w). There- [27] fore, in all these instances, lands purchased after the date

(^p) *Marwood v. Turner*, 3 P. Wms. 169. *Greenhill v. Greenhill*, 2 Vern. 679.

(^q) *Darley v. Darley*, 3 Wils. 6. *Brydges v. Duchess of Chandos*, 2 Ves. Jun. 430.

(^r) *Cotter v. Layer*, 2 P. Wms. 624. *Rider v. Wager*, ib. 329. *Edwards v. Freeman*, ib. 436. *Bennett v. Lord Tankerville*, 19 Ves. 170.

(^s) *Atcherley v. Vernon*, Com. Rep. 381. *Gibson v. Lord Montfort*, 1 Ves. 492.

(^t) *Potter v. Potter*, 1 Ves. 442.

(^u) *Barnes v. Crowe*, 1 Ves. jun. 486. 4 Bro. C. C. 2. S. C.

(^v) *Gibson v. Ld. Montfort*, 1 Ves. 493.

(^w) *Atcherley v. Vernon*, Com. Rep. 382. *Barnes v. Crowe*, 1 Ves. jun. 496.

of the will, and before its re-execution, or before the date of the codicil, or lands contracted for before the date of the will, but conveyed between the date of the will and codicil (^x), shall pass under the will, if the terms of the will be sufficiently comprehensive to include them. For, when a will is republished, the effect is, that the terms and words of the will shall be construed to speak with regard to the property the testator is seized of at the date of the republication, just the same as if he had such additional property at the time of making his will. Hence, if A devise lands by the name of B, C, and D, and purchase new lands, and republish his will, the republication does not concern such new lands, because the will speaks only of the particular lands B, C, and D. But if the testator in his will say, I give *all* my real estate, a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will (^y). So, where a testator charged all his estates with payment of debts, and made his son residuary legatee, and afterwards purchased copyholds, which were duly surrendered to the use of his will, and by codicil devised those copyholds to his son in fee, the codicil was held a republication of the will, so as to subject the copyholds to the payment of debts (^z). Nor is an actual annexation of the codicil to the will, essential to its republication (^a). Whether a mere annexation to the will of the codicil so executed, but silent in respect to any intention of republishing the will, shall have such operation, is a point on which different opinions have prevailed. Lord Camden C. thought that annexation would of itself demonstrate that intention (^b); but by other authorities it has been held that annexation alone would not be thus effectual (^c).

(^x) *Goodtitle v. Meredith*, 2 *Maul.* & Sel. 5. *Hulme v. Heygate*, 1 *Merl. Rep.* 285.

(^y) *Heylyn v. Heylyn*, Cowp. 132. Rolls. Abr. 618. *Beckford v. Parnecott*, Cro. Eliz. 493. *Countess of Strathmore v. Bowes*, 7 Term Rep. 482. *Burke v. Less. of Young*, 2 Serg. & R. 387. 389.

(^z) *Rowley v. Eyton*, 2 *Merl. Rep.* 128.

(^a) *Potter v. Potter*, 1 *Ves.* 442.

(^b) *Attorney-General v. Downing*, *Ambl.* 571.

(^c) *Sympson v. Hornsby*, Prec. Ch. 439. *Hutton v. Sympson*, 2 *Vern.* 722. *Gibson v. Montfort*, 1 *Ves.* 493. *Barnes v. Crowe*, 1 *Ves. jun.* 497. S. C. 4 Bro. C. C. 9. Vid. also *Coppin v. Fernyhough*, 2 *Bro. C. C.* 296.

[28] If a will of lands be not executed pursuant to the statute, although a codicil reciting the will be (^d) thus executed, yet it has been held that the codicil shall not effectuate the will.

An infant, we have seen, is by the stat. 34 and 35 Hen. 8. c. 5. disabled from devising land; but if, after attaining the age of twenty-one years, he re-execute, pursuant to the statute, a will of lands made by him before, it shall be effectual (^e).

A will of personal estate may be expressly republished by a codicil, or other writing, authenticated in the same manner as a will of such property; or by a codicil, or such other writing, from the contents of which such an intention may be fairly inferred; or merely by annexing a codicil, or other writing to such will (^f), whether it expressly refer to the will or not; or such will may be revived by the mere parol declarations of the testator (^g).

In a case where copyhold and personal estates were given by will, and so much of the will was revoked by an interlineation, and a codicil to the same effect, and the codicil was afterwards cancelled; it was held that the cancelling the codicil was effectual to set up the original will, notwithstanding the interlineation was left in the will, upon the evidence of intention (^h).

The statutes of the 32d & 34th of Hen. 8. give the power of devising to all having estates in fee-simple, except in joint-tenancy (ⁱ), over the whole of their socage lands. Persons seised in fee-simple in coparcenary, or in common, in rever-[29] sion, or remainder, are expressly comprised by the last-mentioned statute (^k).

Copyhold lands are not within these statutes, since they require that the tenure should be socage, which copyholds are not (^l); but they are devisable by an application of the doctrine of uses as above stated (^m).

(^d) Attorney-General *v.* Baines, Prec. Ch. 270.

(^e) Herbert *v.* Torball, 1 Sid. 162.

(^f) Coppin *v.* Fernyhough, 2 Bro. C. C. 291.

(^g) Off. Ex. 25. Beckford *v.* Parnecott, Cro. Eliz. 493. and Vid. Abney *v.* Miller, 2 Atk. 599.

(^h) Utterson *v.* Utterson, 3 Ves. & Bea. 122.

(ⁱ) Swift *v.* Roberts, Ambl. 617.

(^k) Sect. 4 and 7.

(^l) Harg. Co. Litt. 111. b. note 1.

(^m) Supr. 6.

CHAP. II.

OF THE APPOINTMENT OF EXECUTORS.

SECT. I.

Who may be an executor—who not—how he may be appointed.

An executor is he, to whom the execution of a last will and testament of personal estate is by the testator's appointment confided (^a).

In general, all persons are capable of sustaining this character; but there are some exceptions, which I shall presently mention.

The king, it seems, may be appointed an executor, but in that case, as he is presumed to be so engaged in public affairs as to have no leisure to attend to the private concerns of individuals, he has a right to nominate persons to execute the trust for him, as well as auditors to whom such nominees shall account (^b).

It was formerly a doubt, whether corporations aggregate could be constituted executors, inasmuch as they cannot take [31] an oath for the due execution of the office (^c); but it now seems settled in the affirmative (^d), and that, on their being so named, they may appoint persons, styled syndics, to receive administration with the will annexed, who are sworn like all other administrators (^e). Such corporations as can take the oath of an executor are clearly competent (^f).

An infant may be appointed an executor (^g), and even a child *in ventre sa mere*; and then if the mother be delivered of two or more children at the birth, they shall all be entitled (^h). But an infant, although appointed, is by stat. 38 Geo. 3. c. 87. s. 6.

(^a) Off. Ex. 2. 2 Bl. Com. 503. Farington v. Knightly, 1 P. Wms. 548. 553. 576.

(^b) 3 Bac. Abr. 5. 11 Vin. Abr. 54. 4 Inst. 335.

(^c) Off. Ex. 17. 1 Bl. Com. 477.

(^d) 1 Roll. Abr. 915. Swinb. 5. s. 1. 3 Bac. Abr. 5. 11 Vin. Abr. 140.

(^e) 1 Bl. Com. 28. n. 2 Bac. Abr. 5.

(^f) Godolph. 85. 3 Bac. Abr. 5.

(^g) Off. Ex. 214. 3 Bac. Abr. 8. 2 Bl. Com. 503.

(^h) Godolph. 102. 3 Bac. Abr. 8.

disqualified from acting in the executorship till he attains the full age of twenty-one years, and an administrator is substituted to act for him in the interval. Before the passing of this act, the law deemed him capable of executing the trust at the age of seventeen (ⁱ). [1]

A feme covert is also capable of the office of an executrix, but not without the consent and concurrence of her husband [³²] band (^k) ; and although she be an infant, if her husband be of age, and assent, he shall have the execution of the will (^l). [2]

An alien friend may be an executor (^m), and so also may an alien enemy, who came here with a safe-conduct, or is commorant here by the king's license, and under his protection, although he came without a safe-conduct (ⁿ). [3] Neither outlawry nor attainder incapacitates a party, for he acts *in autre droit*,

(ⁱ) Off. Ex. 214. 11 Vin. Abr. 99. 5
Co. 29.

(^k) 3 Bac. Abr. 9. Off. Ex. 203. 2 Bl.
Com. 503. Sed vide 1 Fonbl. 86.

(^l) Off. Ex. 215.

(^m) Off. Ex. 15. 3 Bac. Abr. 6.

(ⁿ) 1 Bac. Abr. 5. 137. Co. Litt. 129 b.
Wells v. Williams, Salk. 46. pl. 1.

Ld. Raym. 282. S.C. Lutw. 34.

[1] The age at which the executor may take upon him the trust, varies in the several states. In Vermont, Massachusetts, Rhode Island, and Missouri, it is fixed at 21; in Maryland, at 18. The common law, it would seem, prevails on this subject in the other states.

[2] In Vermont, Rhode Island, and New Hampshire, if a feme sole and another be appointed executors, and she marry during the life of her co-executor, her power shall be extinct, and the co-executor may discharge the trust as if she were dead. In Maryland, no married woman can act as executrix, unless her husband give bond with two sureties in such sum as the Register shall fix, conditioned for the faithful performance of the trust. In Pennsylvania and Delaware, if a feme executrix marry, or be about to marry, not having given security for the performance of her trust, on application to the Orphan's Court, she may be compelled to secure, by mortgage, or bond with sufficient sureties, the shares due to the children of the decedent. In Georgia, if a widow administratrix marry again, the judge of the superior Court may revoke the letters of administration granted to her, or join one or more of the next of kin of the intestate in the administration with her.

[3] By the law of Maryland, an alien cannot be an executor; nor can any one execute this trust, who has been convicted of an infamous crime.

and for the benefit of the deceased (^o). Nor had villenage, during its existence in this country, that effect (^p).

Nor is poverty, nor even insolvency, a disqualification of him in whom the testator has chosen to repose so great a confidence (^q).

A disability, however, may arise in various modes, either from the party's being guilty of certain offences against the established religion; or from his being the subject of an enemy's country, and resident within it, or resident here without the king's license; or, under certain circumstances, from going or residing abroad; or from a defect of understanding.

[33] A person excommunicated is suspended from acting till absolution (^r). By stat. 3 Jac. 1. c. 5. s. 22. a popish recusant, convicted at the time of the testator's death, is altogether incompetent (^s).

By stat. 3 Car. 1. c. 2. s. 1. if any person send another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contribute to his maintenance when there, both the sender, the sent, and the contributor, are subject to the same disability. But by virtue of the stat. 31 Geo. 3. c. 32. Roman Catholics who shall make, take, and subscribe the declaration of their religious profession, and the oath of allegiance and abjuration as appointed by that act, shall be exempt from this as well as other disabilities.

By stat. 9 & 10 W. 3. c. 32. persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall for the second offence, among other incapacities, be disabled from being executors. [4]

(^o) Off. Ex. 16. 3 Bac. Abr. 5. Co. Litt. 128.

3 P. Wms. 388. note b. Anon. 12 Ves. jun. 4.

(^p) Swinb. 5. s. 1. 3 Bac. Abr. 5 Roll. Abr. 915. 11 Vin. Abr. 141.

(^r) Off. Ex. 17. 107. 3 Bac. Abr. 6. 2 Burn's Eccl. Law, 222.

(^q) 3 Bac. Abr. 7. Hill *v.* Mills, Salk. 36. Rex *v.* Raines, Lord Raym. 361. S. C. Salk. 299. 11 Vin. Abr. 143. Walker *v.* Woolaston, 2 P. Wms. 582.

(^s) Hill *v.* Mills, 1 Show. 293. 11 Vin. Abr. 142. 144. See 4 Bl. Com. 56. and stat. 3 Jac. 1. c. 5. s. 10. and 30 Car. 2. s. 2. c. 1.

[4] It is scarcely necessary to observe, that religious opinions do not disqualify in this country.

Also, by the statutes prescribing the qualifications for offices^(t), persons not having taken the oaths and complied [34] with the other requisites for qualifying, who shall execute their respective offices after the time limited for the performance of those acts, shall incur the same incapacity.

Alienage with relation to a hostile country, accompanied with residence abroad, or residence here without the king's permission, either express or implied, is to be classed as a species of disability; for although the cases in respect to the incapacity of alien enemies are not entirely uniform^(u), yet this principle of exclusion, thus modified, seems clearly to exist^(v).

By stat. 5 Geo. 1. c. 27. British artificers going out of the realm to exercise or teach their trades abroad, or exercising their trades in foreign parts, who shall not return within six months next after due warning given them, shall be deemed aliens out of his majesty's protection, and are expressly disqualified for executors.

Idiots, and those who are visited with insanity, or whose intellects are destroyed by age, disease, or intemperance; such persons as, having been born blind and deaf, have always wanted the common inlets of knowledge, are all necessarily incapable of the office^(w).

[35] The authority of an executor, as appears by the definition, is grounded on the will, and may be either express, or implied; absolute, or qualified; exclusive, or in common with others.

He may be expressly nominated, either by a written, or by a nuncupative will^(x).

He may be constructively appointed merely by the testator's recommending or committing to him the charge of those duties, which it is the province of an executor to perform, or by con-

(t) Stat. 25 Car. 2. c. 2. 1 Geo. 1. stat. 2. c. 13. Vide also 13 W. 3. c. 6. s. 6.

(u) 3 Bac. Abr. 6. 1 Bac. Abr. 5. Brocks v. Phillips, Cro. Eliz. 684. Watford v. Masham, Moore 431. Richfield v. Udall, Carter 49. 191. Villa v. Dimock, Skinner, 370. Mollay, lib. 3. c. 2. s. 10. Off. Ex. 15. Anon. Cro. Eliz. 142.

(v) Wells v. Williams, Lord Raym. 282. Openheimer v. Levy, Stra. 1082. Brandon v. Nesbett, 6 Term Rep. 23. Bristow v. Towers, ib. 35.

(w) 3 Bac. Abr. 7.

(x) Off. Ex. 7. 3 Bac. Abr. 28. 11 Vin. Abr. 136.

ferring on him those rights which properly belong to the office, or by any other means from which the testator's intention to invest him with that character may be distinctly inferred. As if a will direct that A shall have the testator's personal property after his death, and, after paying his debts, shall dispose of it at his own pleasure; or declare that A shall have the administration of the testator's goods; this alone constitutes A an executor according to the tenor. So, where the testator, after giving various legacies, appointed that, his debts and legacies being paid, his wife should have the residue of his goods, on condition that she gave security for the performance of his will; this was held to be sufficient to make her executrix. And so where an infant was nominated executor, and A and B overseers, with this direction, that they should have the control and disposition of the testator's effects, and should pay and receive debts [36] till the infant came of age; they were held to be executors in the meantime (v).

His appointment may be either absolute, or qualified. It is absolute, when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time. It may be qualified, as where A is appointed to be executor at a given period after the testator's death; or where he is appointed executor on his coming of age, or during the absence of J. S.; or where A and B are made executors, and B is restricted from acting during A's life; or where A and B are named executors, and if they will not accept the office, then C and D are substituted in their room; or where A is appointed executor on condition that he gives security to pay legacies, or generally to perform the will. So a testator may make A an executor in respect to his plate and household goods, B in respect to his cattle, C as to his leases, and D in regard to his debts; or appoint A an executor for his effects in one county, and B executor for his effects in another; or (which seems more rational and expedient) he may so divide the duty where his property is in various countries. So he may nomi-

(v) 2 Bl. Com. 503. Off. Ex. 8, 9. 3
Bac. Abr. 27. 11 Vin. Abr. 136. Go-
dolph. 83. Com. Dig. Administration

(B.) Cro. Eliz. 48. Pickering v. Tow-
ers, Ambl. 364. Swinb. p. 4. s. 4.

[37] nate his wife executrix during the minority of his son, or so long as she continues a widow (^z).

Lastly, an executor may be appointed solely, or in conjunction with others ; but, in the latter case, they are all considered by the law in the light of an individual person (^a).

SECT. II.

Of an executor de son tort—how a party becomes so.

HAVING thus treated of executors regularly constituted, I proceed now to the consideration of another species of them, who derive no authority from the testator, but who assume the office by their own intrusion and interference. Such an one is styled an executor *de son tort*, or an executor of his own wrong (^b).

Various are the acts which constitute an executor of this description (^c), such as his taking possession of, and converting the assets to his own use (^d) ; living in the house, and carrying on the trade of the deceased (^e) ; paying the deceased's mort-[38] gages, or other debts or legacies out of them ; suing for, receiving, or releasing the debts due to the estate (^f) ; seizing a specific legacy without the assent of the lawful executor (^g) ; entering on a lease or term for years (^h), or an estate *pur autre vie* (ⁱ), (which is made assets by stat. 29 Car. 2. c. 3.) especially if he enter in right of the deceased, and do acts on the land, which belong to the office of an executor ; as turning the cattle upon it ; delivering to the widow more apparel than is suitable to her rank (^k) ; answering in the character of an exe-

(^z) Off. Ex. 10. 12. 3 Bac. Abr. 28. 30. 11 Vin. Abr. 136. 138, 139. Carte v.

Carte, 3 Atk. 180. Chetham v. Lord Audley, 4 Ves. jun. 72.

(^a) 3 Bac. Abr. 30. Off. Ex. 95.

(^b) Off. Ex. 172. 3 Bac. Abr. 20. Swinb. 6. s. 22. No. 2. 2 Bl. Com. 507. 11 Vin. Abr. 210.

(^c) 3 Bac. Abr. 21. 11 Vin. Abr. 205.

(^d) 5 Co. 33 b. Off. Ex. 172. 11 Vin. Abr. 210, 211.

(^e) Hooper v. Summerset, 1 Wightwick, 16.

(^f) Swinb. 6. s. 22. No. 2. Fleice v. Southcot. Dyer, 105. Roll. Abr. 918.

(^g) 3 Bac. Abr. 21. Godolph. 91.

(^h) Swinb. 6. s. 22. No. 2. 3 Bac. Abr. 22.

(ⁱ) Carth. 166.

(^k) Off. Ex. 175.

cutor to any action brought against him, or pleading any other plea than *ne unques executor* (¹). And all other acts of a similar nature, however slight (^m), may have the same consequence, as in one case, merely taking a bible, and in another a bedstead (ⁿ), were held sufficient, inasmuch as they are the *indicia* of the person so interfering being the representative of the deceased. So if J. S. be appointed by the ordinary to collect the effects, and he exceed his authority, and sell any of them, even such as are perishable (^o), or if he had the express direction of the ordinary for such sale, the same being illegal, he becomes an executor *de son tort* (^p).

[39] So where A, the servant of B, sold goods of C, an intestate, both before and after C's death, in consequence of orders given by him in his lifetime, and paid the money arising from such sale into the hands of B; and D had also, in the capacity of a servant, sold other goods of the intestate; on an action brought against B and D as executors, for a debt due from the deceased, they, not having discharged themselves by payment of the money, which they had respectively received, to the rightful administrator at the time when the action was commenced, or even when they pleaded, were both adjudged liable as executors of their own wrong (^q).

So where a creditor took an absolute bill of sale of the goods of the debtor, but agreed to leave them in his possession for a limited time, before the expiration of which the debtor died, and the creditor took and sold the goods; he was held liable to the extent of their value, as executor *de son tort*, for the debts of the deceased (^r).

So by stat. 43 Eliz. c. 8. if administration by fraud be granted to an insolvent person, who gives any of the effects to A, or releases a debt due from him to the intestate, A, for so much, shall be executor *de son tort* (^s).

[40] But there are many acts which a stranger may perform

(¹) 3 Bac. Abr. 21. Godolph. 92.

(^p) Off. Ex. 175. 11 Vin. Abr. 209.

(^m) Padget v. Priest, 2 Term Rep. 100. Stokes v. Porter, Dyer, 166 b.

(^q) Padget v. Priest et al. 2 Term Rep. 97.

11 Vin. Abr. 212.

(^r) Edwards v. Harben, 2 Term Rep.

(ⁿ) 3 Bac. Abr. 24. Noy. 69.

587.

(^o) Off. Ex. 174.

(^s) Vin. Off. Ex. 182, 183.

without incurring the hazard of being involved in such an executorship (^t) ; such as locking up the goods ; directing the funeral, in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects (^u) ; making an inventory of his property (^v) ; advancing money to pay his debts or legacies (^w) ; feeding his cattle ; repairing his houses ; providing necessaries for his children (^x) ; for these are offices merely of kindness and charity.

And although, as I have stated, a party may be executor *de son tort* of a term actually existing, and in that case cannot enlarge his estate by claiming in fee, yet if he enter generally on lands, of which there is no term in being, he cannot qualify his wrong by expressly claiming only a particular estate, but must be a disseisor in fee, and not an executor *de son tort* (^y). Nor can there, generally speaking, be such an executor, when there is a rightful executor, or where administration has been duly granted ; for, if after probate of the will or administration granted, a stranger take possession of the property, he may be sued as a trespasser by the executor or administrator ; but it is otherwise if, after taking such possession, he claim to be executor, pay or receive debts, or pay legacies, or otherwise intermeddle in that character (^z) ; for in all those cases he becomes an executor of his own wrong. [1]

(^t) 3 Bac. Abr. 22. Godolph. 93, 94.

(^x) Swinb. ibid.

(^u) Off. Ex. 174. Swinb. 6. s. 22. No. 2.

(^y) 3 Bac. Abr. 23, 24. Mayor of Nor-

2 Bl. Com. 507. 11 Vin. Abr. 207.

wich v. Johnson, 3 Lev. 35. S. C. 3

Harrison v. Rowley, 4 Ves. jun. 216.

Mod. 90. and 2 Show. 457.

(^v) Swinb. ibid.

(^z) 3 Bac. Abr. 22. 5 Co. 33 b. Anon.

(^w) 3 Bac. Abr. 22. Godolph. 92.

Salk. 313. pl. 19. 11 Vin. Abr. 212.

[1] No action lies against an executor *de son tort*, for waste in not collecting the personal estate and paying the debts of the deceased, and thereby subjecting the lands to be taken into execution ; for he has no authority to collect the effects of the deceased. *Mitchel v. Lunt*, 4 Mass. Rep. 654.

If a person intermeddle with the personal estate of the deceased, he is liable to creditors as executor *de son tort*, so far as he has intermeddled ; and if, when sued, he falsely deny that he is executor, he is made chargeable by his false plea for the debt out of his own estate, if he have not personal estate of the deceased sufficient to pay it. *Ibid.*

But no intermeddling with the lands of the deceased, will charge a person

Whether a man has made himself such an executor, is a question not to be left to a jury, but is a conclusion of law resulting from the facts established in evidence (^a).

SECT. III.

Of the renunciation or acceptance of an executorship. [1]

AN executor may, if he please, decline to act, but he has no power to assign the office (^b). On his being cited by the ordi-

(^a) *Padget v. Priest.* 2 Term Rep. 99.

(^b) 3 Bac. Abr. 42.

as executor *de son tort*; but such intermeddling is a wrong done to the heir or devisee. *Ibid.* 1 Root 183.

Nor will the intermeddling with goods which are held by a conveyance from the deceased, although it be fraudulent, make a man executor in his own wrong.

Taking of administration will not purge the wrong of an executor *de son tort*. *Green v. Dewit.* 1 Root R. 183.

The policy of the several states has varied in regard to an executor *de son tort*. In some, his interference with the estate of the decedent is punishable by penalty; in others, is rewarded by permitting him to retain his debt as a rightful executor or administrator. In Vermont and New Hampshire, a person embezzling or alienating the goods or chattels of the decedent, is chargeable, as executor *de son tort*, to double the value of the article embezzled or alienated; and he may be compelled to render an account, on oath, of the property that may have come to his hands. In Rhode Island, one so alienating or embezzling, is chargeable as executor *de son tort*. In New York and New Jersey, the executor *de son tort* may retain his own debt, and be allowed all debts paid by him, as if he were a lawful executor. In South Carolina, he is considered as a trespasser, and is chargeable as far as assets come to his hands, and is in every respect liable as an executor of his own wrong, at common law.

[1] In Vermont, Rhode Island, New Hampshire, Massachusetts, and Connecticut, if the executor, having knowledge of his appointment, shall not, within thirty days next after the decease of the testator, cause the will to be proved and recorded in the proper Office, or present the will and declare in writing his refusal, he is subjected to a penalty for his delay. In Vermont and Rhode Island, the penalty is ten dollars per month; in New Hampshire and Massachusetts, five pounds; and in Connecticut, seventeen dollars. The propriety of these provisions becomes obvious, when it is considered, that under the Stat. 21 Hen. 8. c. 5. by which the practice of the other states, in this par-

nary, pursuant to stat. 21 H. 8. c. 5, to come in and prove the will, if he neglect to appear, he is punishable by excommunication for a contempt^(c). If he appear, either on citation, or voluntarily, and pray time to consider whether he will act or not, the ordinary may, though the practice seems now obsolete, grant letters *ad colligendum* in the interim^(d): [2] If he refuse, [42] he cannot be compelled to accept the executorship, and his renunciation is entered and recorded in the spiritual court before the ordinary. A refusal, by any act *in pais*, as a mere verbal declaration to that effect, is not sufficient; but, to give

(c) Off. Ex. 37. Vid infr.

(d) *Broker v. Charter.* Cro. Eliz. 92.

ticular, is regulated, the judge of probate can punish by excommunication only the contumacy of the executor who refuses to appear on citation—a punishment, whether taken in its ecclesiastical or civil effect, altogether unknown to the American law. But if the executor do not come in on the citation, he is considered as having refused the office, and it is so recorded, and letters of administration *cum testamento annexo* are granted.

It has been determined in Massachusetts, that if two executors be appointed in a will, and both, knowing of their appointment, neglect to present the will to the Probate Court within thirty days after the testator's decease, a joint forfeiture is incurred under the Stat. of 1783, c. 24. § 16, which may be sued for jointly, and perhaps separately, although but one forfeiture may be recovered. But if the neglect be in one executor, and not in both, the negligent executor alone incurs the forfeiture, and is alone to be sued. If either executor present the will, no forfeiture is incurred by either. *Hill & Ux. v. Davis & al. Ex'rs.* 4 Mass. R. 137.

In Vermont, the judge of probate may enforce his decrees by attachment. *Vermont Laws.*

[2] Letters *ad colligendum* are granted by the ordinary in Maryland, in case of delay on account of the absence from the state of an executor, or of a contest relative to the right of administration, or of a contested will or codicil, or of the negligence of any executor to take out letters testamentary, or the absence or negligence of any person entitled to letters of administration, or on any other account, at his discretion. And in Virginia and Kentucky, such letters may be issued during any contest about a will, or during the infancy or in the absence of an executor, or until a will, which may have once existed, but is destroyed, shall be established, or whenever the Court, from any other cause, shall judge it convenient. And the collector, in all the foregoing states, must give bond, with security, for collecting the estate, making an inventory thereof, and safe keeping and delivering up the same, when required, to the executors or administrators.

its validity, it must be thus solemnly entered and recorded, and then administration with the will annexed will be granted to another (e).

If the executor refuse to take the usual oath, or, being a Quaker, to make the affirmation, this amounts to a refusal of the office, and shall be so recorded (f).

In case the ordinary himself is nominated executor, he may renounce before the commissary (g).

If a party renounce in person, he takes an oath that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors. But he may renounce by proxy, and then the oath is dispensed with.

An executor cannot in part refuse; he must refuse entirely, or not at all (h).

After such refusal, and administration granted, the party is incapable of assuming the executorship (i) during the lifetime of [43] such administrator; but, after the death of the administrator, the executor may retract his renunciation, however formally made; but if administration be committed in consequence merely of his failure to appear on the above-mentioned process, he has a right, at any future time, even in the administrator's lifetime, to come in and prove the will (k).

If he appear, and take the usual oath before the surrogate, he has made his election, and cannot afterwards divest himself of the office, but may be compelled to perform it (l).

So, if he once administer, he is absolutely bound (m); and by stat. 37 Geo. 3. c. 90. s. 10. if he administer, and omit to take probate within six months after the death of the deceased, he is liable to the penalty of fifty pounds (n).

(e) Off. Ex. 38. 4 Burn. Eccl. L. 198. Swinb. 6. s. 12^o. Roll. Abr. 907.

(f) 4 Burn. Eccl. L. 213. *Rex v. Raines, Ld. Raym.* 363.

(g) Ibid. 38.

(h) 11 Vin. Abr. 139. *Anon. Brownl. 82. Fooler v. Cooke.* 1 Salk. 297.

(i) Swinb. 6. s. 12. 3 Bac. Abr. 42, 43. Off. Ex. 39.

(k) Off. Ex. ibid. Com. Dig. Admon. (B. 4.) infr.

(l) Swinb. 6. s. 12. 1 Ventr. 335. 11 Vin. Abr. 207.

(m) 4 Burn's Eccl. L. 198. Swinb. 6. s. 12. *Wankford v. Wankford.* Salk. 301. 304. 307.

(n) Vid. infr.

The acts which amount to an administration are all such as indicate an election of the executorship (^o), and within this class all such acts as constitute an executor *de son tort* are of course comprehended (^p). Hence, it hath been adjudged, that if he [44] take the goods of a stranger, under an idea that they belonged to the testator, and with an intent to administer them, this act is sufficient to charge him; as, where the testator was tenant at will of certain goods, and the executor seized them, supposing they were part of the deceased's effects, and intending to administer them, this was held to be an election of the office (^q). But it is otherwise if the executor take the testator's goods on a claim of property in them himself, although it afterwards appear that he had no right, since such claim is expressive of a different purpose from that of administering as executor (^r). So, if an executor sequester goods in the character of a commissary, that is no assent to the executorship (^s).

But if there be two executors, and one of them have a specific legacy bequeathed to him, and take possession of it without the consent of his co-executor, such act amounts to an administration (^t). So, if an executor have refused before the ordinary, and administration hath been granted, if it appear he had administered before, and thus determined his election, the letters of administration may be revoked, and he may be enforced to prove (^u).

If there be several executors, they must all duly renounce before the administration with the will annexed can be granted (^v).

[45] If some of them renounce before the ordinary, and the rest prove the will, the renunciation is not peremptory; such as refused may, at any subsequent time, come in and administer, and although they never acted during the lives, they may assume the execution of the will after the death, of their co-executors, and shall be preferred before any executor appointed

(^o) 3 Bac. Abr. 44. Roll. Abr. 917.

11 Vin. Abr. 205.

(^p) 3 Bac. Abr. 44. Roll. Abr. 917.
Swinb. p. 6. s. 22.

(^q) Roll. Abr. 917. 11 Vin. Abr. 206.

(^r) 3 Bac. Abr. 44. Roll. Abr. 917.

(^s) Roll. Abr. 917. 11 Vin. Abr. 206.

(^t) Roll. Abr. 917. 11 Vin. Abr. 206.
(^u) Off. Ex. 40.

(^v) Roll. Abr. 907.

by them (^w). And if administration be committed before a refusal by the surviving executor, such administration will be void (^x).

If an executor of an executor intermeddle in the administration of the effects of the first testator, he cannot refuse the administration of the effects of the latter; but he may take upon himself the latter, and refuse the former (^y).

SECT. IV.

Of an executor before probate of the will.

As a consequence of the principle that an executor derives all his title from the will, his interest is completely vested at the [46] instant of the testator's death; and therefore before probate, that is, before the will is authenticated in the spiritual court, and a copy of it delivered to him, certified under the seal of the ordinary, he may lawfully perform almost every act which is incident to the office (^z). Not to mention the funeral, he may make an inventory, and possess himself of the testator's effects (^a): he may enter peaceably into the house of the heir, and take specialties, and other securities for the debts due to the deceased (^b), or remove his goods (^c): he may pay or take releases of debts owing from the estate: he may receive or release debts which are owing to it (^d): he may sell, give away, or otherwise dispose, at his discretion, of the goods and chattels

(^w) 5 Co. 28. 9 Co. 36 b. Anon. Dyer, 160. House v. Lord Petre. 2 Salk. 311. Mead v. Lord Orrery. 3 Atk. 239. Robinson v. Pett, 3 P. Wms. 251. vid. also Rex v. Simpson. Burr. 1463. S. C. 1 Bl. Rep. 456. 11 Vin. Abr. 55. 66.
(^x) Wankford v. Wankford. Salk. 308.
(^y) Shep. Touchst. 464.
(^z) Com. Dig. Admon. B. 9. Plowd.

Com. 280. Smith v. Milles. 1 Term Rep. 480. 3 Bac. Abr. 52. Off. Ex. 34. 11 Vin. Abr. 202. Wankford v. Wankford. 1 Salk. 299.

(^a) Off. Ex. 34.

(^b) Off. Ex. 34.

(^c) Ibid. 92. Vid. infr.

(^d) Ibid. 35.

of the testator (^e) : [1] he may assent to or pay legacies (^f) : he may enter on the testator's term for years (^g) : he may commence actions in right of the testator, as for trespass committed, or goods taken, or on a contract made in the testator's lifetime, although he cannot declare before probate, since, in order to assert such claims in a court of justice, he must produce the copy of the will, certified under seal as above-mentioned, or, as it is sometimes styled, the letters testamentary ; but when [47] produced, they shall have relation to the time of suing out the writ (^h). So, if in the same right he file a bill in equity, a subsequent probate shall be equally available (ⁱ) ; and, according to a late case, it seems sufficient if it be obtained at any time before the hearing (^k). So, an executor may before probate arrest a debtor to the estate, and shall be justified in that act by the relation of the subsequent grant (^l). But such relation shall not prejudice a third person ; and therefore, where the debtor, after being arrested by the executor before probate, paid a debt to J. S. and continued two months in prison, he was adjudged not to be a bankrupt from the time of the arrest, so as to invalidate that payment (^m).

An executor may also maintain actions on his own possession, as trespass, detinue, or replevin, for goods or cattle of the testator taken after the testator's death (ⁿ) : so, if he be en-

(^e) Ibid. 35.

(^f) Ibid. 35. 11 Vin. Abr. 204.

(^g) 11 Vin. Abr. 203.

(^h) 11 Vin. Abr. 202. et seq. Com. Dig. Admon. B. 9. Off. Ex. 36. 3 Bac. Abr. 53. 9 Co. 38. Harg. Co. Litt. 292 b.

(ⁱ) Humphreys v. Ingledon, 1 P. Wms. 752. Humphreys v. Humphreys, 3 P. Wms. 351.

(^k) Patten, executrix, v. Panton, 1793, cited 3 Bac. Abr. 53.

(^l) Off. Ex. Suppl. 103. Roll. Abr. 917.

(^m) 11 Vin. Abr. 204. 3 Bac. Abr. 53. Com. Dig. Admon. B. 9. Duncomb v. Walker. 3 Lev. 57. Skinn. 22. 87. Cooke's Bank. Laws. 4th edit. 94.

(ⁿ) 11 Vin. Abr. 203. Off. Ex. 36.

[1] In Virginia, where the executor must qualify himself by giving bond with surety, if a person named as one of the executors, not having so qualified himself, sell a slave belonging to the estate of his testator, and die without being qualified, the sale is void against the executor who did qualify, though made for a valuable consideration, and at a time when there was no qualified executor. Monroe Ex. of Jones v. Jones, 4 Munford's Rep. 104.

titled as executor to the next presentation to a living, and it become void, he, or his grantee, may maintain a *quare impedit* for it before probate^(o).

[48] So he may maintain actions, as trespass or trover, for such of the effects as never came into his actual possession, taken or converted after the testator's decease^(p). So he may maintain actions on contracts either actually made with him subsequent to that event, or arising by legal implication, as assumpsit for the goods sold by him^(q), or for money due to the testator, received by the defendant after the testator's death^(r). In all such cases, the causes of action arise subsequent to the attaching of the plaintiff's right, and therefore he need not describe himself as executor^(s), and consequently no profert of the letters testamentary is requisite. So, where a reversion for years is vested in him in that character, he may avow without probate for the rent which accrued after the testator's death, but not for such as accrued before^(t).

Such are the acts, which an executor, although the will has not received the sanction of the spiritual court, is warranted in performing, and which his death before probate will not annul^(u).

On the other hand, if he have elected to administer, he may [49] also before probate be sued at law, or in equity, by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible^(v).

If an executor die before probate, he is considered in point

^(o) 3 Bac. Abr. 53. Off. Ex. 36. Com. Dig. Pleader. O. 14. Smithley v. Chomeley. Dyer, 135.

^(p) 3 Bac. Abr. 53. Frederick v. Hook. Carth. 154.

^(q) Off. Ex. 36, 37. in note 1. Anon. Ventr. 109. Bolland v. Spenser. 7 Term Rep. 358. Harris v. Hanna. Ca. Temp. Hardwicke, 204. Cockerill v. Kynaston. 4 Term Rep. 277.

^(r) Nicholas v. Killigrew. Ld. Raym. 436.

^(s) Smith v. Barrow, 2 Term Rep. 477.

^(t) Wankford v. Wankford. 1 Salk. 302. 307. Bolland v. Spenser. 7 Term Rep. 359.

^(u) Off. Ex. 35. 11 Vin. Abr. 204. Anon. Dyer, 367. Wankford v. Wankford. 4 Salk. 306, 307.

^(v) Com. Dig. Admon. B. 9. Plowd. Com. 280 b. 11 Vin. Abr. 205. Dulwich College v. Johnson. 2 Vern. 49. Off. Ex. 37.

of law as intestate in regard to the executorship (^w), although he have made a will and appointed executors; and although he die after taking the oath, if before the passing of the grant.

If A be executor for a certain period, and B be nominated executor for the time subsequent, and A prove the will; after the time is expired, B may sue without another probate (^x).

SECT. V.

Of the probate.—Jurisdiction of granting the same—of bona notabilia. [1]

I PROCEED now to consider the probate of a will. The jurisdiction of proving wills consequent, as will be hereafter shown,

(^w) Off. Ex. Suppl. 74, 75. 182. 11 (^x) Com. Dig. Admon. B. 9. Ca. Ch. Vin. Abr. 68. 90. 265. 11 Vin. Abr. 56.

[1] The ecclesiastical polity of England was not brought by our forefathers to America. The clerical jurisdiction over the estates of decedents, was therefore to be supplied to every colony before the Revolution, and to every state constituted since. A history of these substitutions might be interesting; but our plan does not admit of more than an outline of the systems, as they are at present established.

In Vermont, New Hampshire, and Connecticut, Courts of Probate are erected in certain districts, with one judge each, having power to appoint a clerk. These Courts have jurisdiction over the probate of wills, granting of administrations, the appointment of guardians, and all matters of a testamentary nature. In case of difficulty or dispute, the judge may call to his assistance two or three justices of the *quorum* of the county in which the dispute arises.

In Rhode Island, the *Town Councils* in the several towns in the state are the Courts of Probate for their respective towns, and have original jurisdiction of all *probate* cases, and authority to grant administration in their respective towns.

In Massachusetts, by the Stat. of Feb. 24, 1818, a judge is appointed in each county, for taking the probate of wills and granting administration; for appointing guardians; for examining and allowing the accounts of executors, administrators, or guardians; and for such other matters as the Courts of Probate in the several counties shall have by law cognizance and jurisdiction of.

A like Court is also established in Maine, with authority over all matters relating to the settlement of the estates of decedents.

An appeal lies from these Courts to the Superior or Supreme Court.

[50] on the power of granting administrations, regularly belongs to the bishop of the diocese, or the metropolitan of the province,

In Massachusetts, the power of granting administration upon the estates of persons who at the time of their death were inhabitants of the commonwealth, is vested exclusively in the judge of probate for the county in which the deceased dwelt at the time of his death; and the doings of any other judge of probate in such case would be merely void. *Cutts & al. v. Haskins*, 9 Mass. Rep. 543.

When a deceased intestate has left any estate within the commonwealth, although he were not an inhabitant or resident at the time of his death, administration may be granted by the judge of probate of any county where the estate lies; and the person first obtaining administration will have legal authority to administer all the estate of the intestate, although it may lie in several counties of the commonwealth. *Goodwin v. Jones*, 3 Mass. Rep. 514. *Stevens, Adm. v. Gaylord*, 11 Mass. Rep. 256.

If a foreigner, or citizen of any other of the United States, die, leaving debts and effects in this state, these can never be collected by an administrator appointed in the place of his domicil; but administration must be granted to some person here for that purpose, which will be considered as ancillary merely to the principal administration. *Ibid.* But in such case, it is not necessary that an administrator be appointed in the place of the deceased's domicil, before administration is granted. *Ibid.* 2 Root, 426.

In New York, a Court of Probate, having one judge, is held in the city of Albany, of which city the judge must be a resident; and a surrogate is appointed in each county of the state, by the executive. The judge and surrogates are empowered to take probate of wills of all deceased persons, who, at or immediately previous to their deaths, were inhabitants of the respective counties of such surrogates, in whatever place the death of such persons may have happened; to grant letters testamentary thereon, and letters of administration of the goods, &c. of all persons dying intestate, or with the will annexed where it shall be requisite. The Court of Probate is the Prerogative Court, and has concurrent jurisdiction with the surrogates of the several counties of the state, in cases where persons die out of the state, or die within the state not being inhabitants thereof.

An inhabitant of New York went into another state, leaving behind him his wife and property, and there resided seven years, and died intestate. It was held that he had ceased to be an inhabitant of New York, (there being no evidence of an *animus revertendi*,) and it belonged to the judge of probate, and not to a surrogate, to grant administration of his goods and chattels within that state. *Weston v. Weston*, 14 Johns. Rep. 428.

In New Jersey, the governor is the ordinary or surrogate general. He has power to grant probate of wills, letters of administration, letters of guardianship, and marriage licenses; and to hear and finally determine all disputes that may arise thereon. The secretary of state is the Register of the Prerogative Court. A deputy surrogate is appointed in every county, whose power is

in which the parties resided at the time of their death (^y). But if a testator die within some peculiar jurisdiction, which is

(^x) 3 Bac. Abr. 34. 39. Com. Dig. Admon. B. 6. 4 Burn. Eccl. L. 188.

limited to the county for which he is appointed, and he is *ex officio* Clerk or Register of the Orphan's Court. It is the duty of the surrogate to take the deposition to wills, administrations, inventories, and administration bonds, in cases of intestacy, and transmit them to the Registry of the Prerogative Court, where no objection, difficulty, or dispute, shall arise thereon. But in all cases where doubts arise on the face of the will, or a caveat is put in against proving a will, and wherever disputes happen respecting the existence of a will, the fairness of an inventory, or the right of administration, the parties are to be summoned by the Register before the Orphan's Court, where the cause is heard in a summary way, and decided by the judges, subject to an appeal to the Prerogative Court, if demanded by the party within one month after the decree of the Orphan's Court. It is also the duty of the surrogate to audit and state the accounts of executors and administrators to the Orphan's Court, before which they are to be investigated, if exceptions be taken to his report. *Laws of New Jersey.*

In Pennsylvania, an Office for the probate of wills and granting letters of administration, called the Register's Office, is established in each county. The officer is appointed by the governor, and has power to appoint a deputy. An appeal lies from the Register to the Register's Court, composed of the Register and two or more judges of the Common Pleas.

The power of this Court, under the several Acts of Assembly now in force, extends no further than to decide on *caveats* respecting the validity of wills, and controversies as to whom letters of administration shall be granted. It has no power to settle the accounts of administrators, and consequently no power to issue an attachment against an administrator for not obeying a citation to appear and render his accounts. *Commonwealth v. Brady*, 3 Serg. & R. 309.

On filing a *caveat* against the probate of a will, either party may demand a trial by jury. In such case, the Register's Court directs an issue to determine the will, to be tried in the Common Pleas, which being tried and returned, the Register's Court takes the fact as settled. *Spangler v. Rambler*, 4 Serg. & R. 193. With regard to personal estate, such decision is absolute; but the verdict on the issue is not considered conclusive with respect to real estate, and the party dissatisfied may have the title tried in ejectment. *Ibid.*

When the dispute is about the *fact* of the execution or the sanity of the testator, the Register's Court may send an issue to the Common Pleas, even without the request of either party; but when the dispute is about the *legality* of the execution, the Court is the proper tribunal. *Cumberland*, 1793. 1 Sm. Laws, 10. *Anon.*

In Delaware, a Register is appointed in each county, with authority to take probate of wills, grant letters testamentary and of administration, and to adjust and settle the accounts of executors, administrators, and guardians. An appeal lies from the Register to the Supreme Court. It is doubted whether he may,

either regal, archiepiscopal, episcopal, or archidiaconal : in each of these the owner hath of common right the power of

in disputed cases, send an issue to be tried by the Common Pleas or Supreme Court.

In Maryland, the governor, with the consent of council, is authorized to appoint three justices of the Orphan's Court in each county, for the purpose of taking the probate of wills, granting letters testamentary and of administration, directing the conduct and settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans, and administering justice, in all matters relative to the affairs of deceased persons, according to law. There is a Register of wills, who is *ex officio* clerk of the Orphan's Court, and has an Office seal in common with it. The Court has like powers with Chancery to enforce its decrees, and may proceed like Chancery by bill or petition, and answer under oath or affirmation of defendant; and at the request of either party, may send an issue to be tried by any Court of law, and award costs to the party entitled thereto in the opinion of the Court. An appeal lies from this Court to the Court of Chancery, or to the general Court of the Shore whereon such Orphan's Court is held. The appellate Court is authorized to affirm the decree of the Court below, or direct the manner in which it shall be changed or amended ; and its decision is final and conclusive.

In Virginia and Kentucky, the several district, county, or corporation Courts have jurisdiction over the probate of wills and causes testamentary, and the granting of administration. Letters testamentary, and letters of administration, must be granted from the Court of the district, county, or corporation, in which the mansion-house of the decedent lies, or in which was his place of residence. If he had no such place of residence, and lands be devised in the will, then the will shall be proved in the district, &c. where such lands lie; or in one of them where there are lands in several districts or counties. Or if he had no such place of residence, and there be no lands devised, the will may be proved, or, if the case require it, letters of administration may be granted, by the Court of the district, &c. in which the decedent died, or that, wherein his estate or the greater part thereof shall be. Or letters testamentary, or of administration, may be granted, in any case, by the General Court.

Under the Virginia Statute, it has been determined, that, notwithstanding a will has been admitted to record in a district Court, a county Court has jurisdiction to try its validity. *Ford v. Gardner et al.* 1 Hen. & Munf. 74.

The county and corporation Courts, at *quarterly terms*, may, in their discretion, receive the probate of deeds or wills, or transact any business embraced by the *general jurisdiction* of the Courts; but at a monthly session, they cannot take jurisdiction of any case expressly and exclusively assigned to a quarterly term. 3 Hen. & Munf. 565. *Wilkinson v. Mayo.*

In North Carolina, all wills are proven, and administrations granted, in the Courts of the county where the testator or intestate had his usual residence at

granting probate. This privilege is founded on the notion of an original composition between such owner and the ordinary of the diocese for that purpose (^z).

(^z) 3 Bac. Abr. 39. Denham v. Stephenson. Salk. 40, 41. 11 Vin. Abr. 77.

the time of his death; or in case the decedent had fixed places of residence in more than one county, in either or any of said counties; and in case of a written will, with the witnesses thereto, the same shall be proved by at least one of the subscribing witnesses, if living; but if contested, shall be proven by all the living witnesses, if to be found, and by such other persons as may be produced to support such will; and where the validity of any last will or testament shall be contested, the same shall be invariably tried by a jury, on an issue made up under the direction of the Court for that purpose; any usage or law to the contrary notwithstanding. 2 Haywood's Rep. 3.

In South Carolina, an ordinary is appointed by the Legislature for each *district*, without salary, but having fees. He holds a Court as occasion requires; and has cognizance of probate of wills, granting letters of administration, the examination and settlement of executors' and administrators' accounts, distributions of assets, &c. with all requisite powers for this purpose. An appeal lies from the ordinary to the Common Pleas of the district.

In Georgia, the inferior Court of each county is constituted a Court of ordinary, to take probate of wills, grant letters of administration, and to determine all testamentary causes touching the proof of wills. To the clerk of such Court, who is commissioned by the governor, application must be made for letters of administration, of which he must give notice in one of the public gazettes, and by advertisement at the county court-house, at least thirty days before the sitting of the Court. But the clerk may grant, at his discretion, letters to collect and take care of the effects of the deceased, until such meeting of the Court. And the Court has like power to grant such letters, in case of appeal from their determination to the superior Court. In either case, the collector must give security.

In Ohio, the Court of Common Pleas has the probate of wills, and the granting of letters testamentary and of administration; and generally takes cognizance of all probate and testamentary causes and matters, and has the appointment of guardians. An appeal lies to the Supreme Court.

In Illinois, by Stat. Feb. 10, 1821, a Court of Probate, held by a single judge, is established in each county. An appeal lies to the *Circuit Court*.

In Indiana, the Court of Probate is held by the judges of the Circuit Court. The clerks of the several Circuit Courts are authorized to take proofs of last wills and testaments, and to grant letters testamentary and of administration, in *vacation*, subject to be revoked by the judges in term time. These clerks are recorders of wills; and all administration bonds, inventories, accounts, &c. and other documents appertaining to the settlement of estates of decedents, are filed in their respective Offices.

Courts baron, which have had the probate of wills from time immemorial, and have always continued that usage, are also entitled to this species of jurisdiction ; but they can claim it only by prescription (a).

By custom also the probate of wills of burgesses belongs to the mayors of some boroughs in respect of lands devisable within the same ; yet, as to personal property, the will must be proved before the ordinary (b).

But in general a probate can be granted only in the court of the ordinary, or of the metropolitan.

[51] If all the effects at the time of the testator's death lie within one diocese, the executor ought regularly to appear before the bishop, or his surrogate, and prove the will.

But if the testator hath left *bona notabilia*, or effects to the value established by 92 canon *Jac. 1.* namely, a hundred shillings in two distinct dioceses, or in several peculiars within the same province ; then the will must be proved before the metropolitan, by way of special prerogative (c) ; whence the court where the validity of such wills is tried, and the office where they are registered, are called the prerogative court, and the

(a) 3 Bac. Abr. 39. Off. Ex. 44. Denham *v.* Stephenson, Salk. 41. Atkins *v.* Hill. Cowp. 286.

(b) 3 Bac. Abr. 40. Off. Ex. 45. Off. Ex. Suppl. 10.

(c) 2 Bl. Com. 509. 3 Bac. Abr. 36. Com Dig Admon. B. 3. Off. Ex. 45. 48. 4 Burn. Eccl. L. 191. Roll. Abr. 909. 11 Vin. Abr. 79. Swinb. p. 6. s. 11.

In Alabama, Missouri, and Tennessee, the county Courts are invested with all the powers of the ordinary. An appeal lies to the Circuit Court.

In Louisiana, there is a judge appointed in each parish, called the "parish judge," who is *ex officio* judge of probate. An appeal lies to the District Court.

In Mississippi, there is a Court of Probate in each county, composed of a single judge and clerk. It has cognizance of all matters relating to the duties and powers of a surrogate in England. The Court holds stated monthly sessions. An appeal lies to the superior Court of the county, in all cases.

In all the states, the probate is made by the subscribing witnesses, and it is conclusive on the heir, if unappealed from, in the following states :—Vermont, New Hampshire, Connecticut, Massachusetts, Maine, Georgia, Indiana, Tennessee, and Maryland. But it is not so conclusive in New York, Pennsylvania, New Jersey, Delaware, Virginia, Kentucky, Ohio, North Carolina, South Carolina, Alabama, Missouri, and Louisiana. In Rhode Island, the law is unsettled.

prerogative office, of the provinces of Canterbury and York (^d). So if there be *bona notabilia* in those several provinces, the archbishops shall in each of them grant a probate according to the *bona notabilia* in their respective provinces. Each of them has supreme jurisdiction, and neither can act within the province of the other (^e). If there be *bona notabilia* in different dioceses of one province, and in one diocese only of the other; in respect to the former, the archbishop shall have the probate; in respect to the latter, the particular bishop (^f).

[52] So if the testator, not in *itinere*, die in one diocese, not having any goods there, but having *bona notabilia* in another diocese, the archbishop shall grant the probate (^g).

So if the goods be in several peculiars of a bishop's diocese, in that case probate shall not be granted by him, but by the metropolitan, inasmuch as peculiars are exempt from ordinary jurisdiction (^h). But where the testator dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, there must be several probates: the archbishop shall have no prerogative, because the peculiar was derived out of his episcopal jurisdiction (ⁱ). By the canon 92 *Jac. 1.* above referred to, goods which a man has with him, who dies in *itinere*, shall not make *bona notabilia* (^k); but if a man have two houses in different dioceses, and resides chiefly at one, but sometimes goes to the other, and being there for a day or two, dies, leaving no *bona notabilia* in the first-mentioned house, probate shall be granted by the bishop of the diocese in which the testator died, for he was commorant there, and not there as a traveller (^l).

[53] If there be *bona notabilia* in England and Ireland, several probates shall be granted by the archbishop or bishop in England, and the archbishop or bishop in Ireland, as the case

(^d) 2 Bl. Com. 509. 11 Vin. Abr. 56. pl. 7. Vid. Harg. Co. Litt. 94.

(^e) 3 Bac. Abr. 36. Burston v. Ridley. 1 Salk. 39. Shaw v. Stoughton, 2 Lev. 36. 11 Vin. Abr. 76. pl. 15. Off. Ex. 48.

(^f) Off. Ex. 48.

(^g) 3 Bac. Abr. 36. Roll. Abr. 909. 4 Burn. Eccl. L. 189. 11 Vin. Abr. 80.

(^h) 4 Burn. Eccl. L. 191. 11 Vin. Abr. 80. Gibs. Cod. 472. Swinb. p. 6. s. 11.

(ⁱ) 4 Burn. Eccl. L. 191. Gibs. Cod. 472. Cro. El. 719. Vid. 1 Bl. Com. 380.

(^k) Vid. Off. Ex. 45, & Suppl. 27.

(^l) 4 Burn. Eccl. L. 191. Hilliard v. Cox. 1 Salk. 37.

may require (^m). The probate of a bishop's will, although he had goods only in his own jurisdiction, belongs to the archbishop of the province (ⁿ). If the testator died beyond sea, although the goods be in one diocese only, the archbishop is to grant the probate (^o). If the probate be granted by a bishop, or inferior judge, when it does not belong to him, it is void; but if it be granted by the metropolitan when it does not belong to him, it is only voidable, and is of force till reversed by sentence, for he hath jurisdiction over all the dioceses within his province (^p).

In the above-mentioned canon, *Jac. 1.* there is a provision, that the jurisdiction of those dioceses shall not be prejudiced where, by composition or custom, *bona notabilia* are rated at a greater sum, as in London, where by composition they are to amount to ten pounds (^q).

Nor is it necessary that the deceased should have left effects to the value of five pounds in each of the several dioceses where they are dispersed; if there be effects in any one diocese, [54] other than that in which he died, to the amount of five pounds, they constitute *bona notabilia* (^r). But if the goods in the diocese where he died be of the value of ten pounds or upwards, and he have not left goods amounting to five pounds in another diocese, they shall not be denominated *bona notabilia* (^s). If goods be left in two dioceses to the amount of five pounds in the whole, they shall be *bona notabilia*, and consequently subject to the archbishop's jurisdiction (^t), for in that case neither of the bishops has an exclusive authority. *Bona notabilia* may consist of goods to the value of five pounds in one diocese, and a lease or term for years of that value in another, in which the lands lie (^u).

(^m) 3 Bac. Abr. 36. Daniel *v. Luker*. Dyer, 305. Roll. Abr. 908. Gibs. Cod. 472.

(ⁿ) 3 Bac. Abr. 37. 4 Inst. 335.

(^o) Ib. Ib. 35. Roll. Abr. 908.

(^p) Ib. Ib. 36. 4 Burn. Eccl. L. 193. Off. Ex. Suppl. 27. 11 Vin. Abr. 75. 80. Gibs. Cod. 472.

(^q) 3 Bac. Abr. 37. Off. Ex. 45.

(^r) Ibid. 87. Godolph. 69.

(^s) Ibid. 37. Ibid. 69.

(^t) 4 Burn. Eccl. L. 189. Roll. Abr. 908, 909.

(^u) 3 Bac. Abr. 37. Com. Dig. Admon. B. 4.

Debts due to the deceased, however difficult to be collected, or however desperate, may make *bona notabilia* (v).

So, it seems, a debt due from the king, for which there is no remedy but by petition, may fall within the same description (w).

But if there be a bond in the penalty of five pounds to secure the payment of a less sum, and the same be forfeited, it shall not be classed among *bona notabilia* (x). And it was so held even antecedently to the statute 4 & 5 Ann. c. 16. s. 13. whereby [55] the penalty is saved on bringing principal, interest, and costs, into court.

Nor shall lands devised to executors for payment of debts and legacies, although they become assets, be considered as such goods (y).

On this point the law makes a distinction between debts by specialty and debts by simple contract. It regards debts by specialty as the deceased's goods in that diocese where the securities are found at the time of his death, although they were entered into in another, or the debtor or creditor, at the time when they were executed, lived in a different diocese (z). But debts by simple contract follow the person of the debtor, and therefore are esteemed the deceased's effects in that diocese where the debtor resided at the creditor's death (a). On this principle it hath been holden, that a judgment obtained in one of the courts at Westminster, although in an action laid in Dorsetshire, made *bona notabilia*, because the record was at Westminster; but that a debt on a bill of exchange followed the person of the debtor (b).

An annuity out of a parsonage shall be reputed to be property in the diocese where the parsonage lies (c).

(v) 3 Bac. Abr. 47. Com. Dig. Admon. B. 4.

(w) Off. Ex. 46. 11 Vin. Abr. 80.

(x) Off. Ex. 46.

(y) 3 Bac. Abr. 37. Off. Ex. 47. 11 Vin. Abr. 80.

(z) 3 Bac. Abr. 37. Off. Ex. 46. Roll. Abr. 909. Shep. Touchst. 463.

(a) 3 Bac. Abr. 38. Off. Ex. 47.

(b) Gold v. Strode. Carth. 149. Denham v. Stephenson. 1 Salk. 40. Adams v. Savage. Ld. Raym. 854. 11 Vin. Abr. 77. 80.

(c) Com. Dig. Admon. B. 4. Daniel v. Luker. Dyer, 305, in note. 11 Vin. Abr. 80.

[56] And leases for years where the land lies, not where the lease is merely found (^d).

Debts on recognizances, statutes, or judgments, shall be *bona notabilia*, where they were acknowledged or given (^e).

And by statute 4 & 5 Ann. c. 16. s. 26. salary, wages, or pay due to persons for work in any of her majesty's yards or docks, shall not be taken or deemed to be *bona notabilia*, whereby to found the jurisdiction of the prerogative courts.

But to obtain an order of the Court of Chancery for the payment of money out of court, however small the amount, a prerogative probate is held to be indispensable. (^f) [2]

(^d) Com. Dig. Admon. B. 4.

(^f) Newman *v.* Hodgson. 7 Ves. jun.

(^e) Com. Dig. Admon. B. 4. Daniel *v.*

409. Thomas *v.* Davies. 12 Ves. jun.

Luker. Dyer, 305, in note.

417.

[2] It will be perceived at once, that all the learning relative to *bona notabilia* is inapplicable in the several states; as the officers of probate for each county or district are independent of each other, and are established solely with regard to the convenience of the people. But it may be proper to introduce here the law in the several states, relating to letters testamentary, and letters of administration, granted in another state, or in foreign countries.

By the codes of Vermont, New Hampshire, Massachusetts, Maine, and Rhode Island, it is provided, that the copy of a will, duly proven in a Probate Court of any of the United States, or in any foreign state or kingdom, may be filed and recorded in any Probate Court of the said states respectively, and that it shall have the force of an original will proved and allowed in the same Court of Probate; and bond shall be taken, or administration granted, and the estate settled, as in cases where wills are duly proven in such states respectively. But when the executor shall present the copy of such will, so proved out of the state, to any judge of probate, and shall desire (in writing) that the same may be filed and recorded pursuant to the Statute, it is made the duty of the judge to assign a time and place to take the same into consideration, and to give notice in some newspapers of the state, three weeks successively, thirty days at least before the time assigned, to the end that any person may appear and show cause against the filing and recording of the will.

In Connecticut and New York, the executors or administrators, having letters in another state, cannot sue without proving the will and taking out letters testamentary; and in case there be no will, the administrators must take out letters of administration.

In New Jersey, by an old colonial Act, (1714,) it is enacted, that the copy of any will made in Great Britain or Ireland, or in any of his Majesty's colonies, whereby any land, &c. or other estate in that province is devised or bequeathed,

If the will be not contested, the executor may prove it in the common form by his own oath, and in some of the dioceses of

if certified under the seal of the Office, (if made in Great Britain or Ireland,) where such will or testament is proved and lodged; or if made in any such colony, and certified under its great seal, may be given in evidence in any Court within the province, and shall be esteemed as valid and sufficient as if the original will were produced and proved.

In Pennsylvania, it is enacted, that all wills in writing, proved in the Chancery of England, and the bill, answer, and deposition, transmitted hither under the seal of that Court, or proved in the Hustings or Mayor's Court in London, or in some Manor Court, or before such as shall have power in England or elsewhere to take probate of wills and grant letters of administration; and a copy of such will, with the probate annexed, being transmitted here under the seal of the Court or Office where the same have been taken or granted, and recorded in the Register-General's Office (Register's Office) of that province, shall be good and available in law, for the granting, conveying, and assuring the lands and hereditaments therein devised, as well as of the goods and chattels thereby bequeathed. And all such probates, as well as all letters of administration, granted out of this province, being produced here, are declared to be matter of record, and sufficient to enable the executors or administrators, by themselves or attorneys, to bring their actions in any Court, as if the same probates, or letters testamentary, or administrations, were granted here, and produced under the seal of the Register (General) of this province.

This Statute has in substance been adopted in Delaware, except that in lieu of the word "elsewhere," a more special enumeration of the places from whence copies of wills may be received, is given, in the following words: "That any will, &c. proved in the Chancery of England, Scotland, or Ireland, or in the Court of Chancery in any colony, plantation, or island, in America, belonging to his Majesty, or which has been or shall hereafter be proved in the Hustings or Mayor's Court in London, or in some Manor Court," &c. Executors or administrators, having letters in another state, may sue in this.

But in Maryland, though an attested copy, under the seal of Office, of any will recorded in any Office authorized to record the same, may be admitted as evidence in any Court of law or equity, yet the execution of the original will may be contested, until probate be made according to the law of that state. Letters must be taken out in this state, by executors or administrators having letters in another state.

And in Virginia, authenticated copies of wills, proved according to the laws of any of the United States, or of countries without the limits thereof, relating to any estate within that commonwealth, may be proved in the General Court, or in the Court of the district or county where the estate devised shall lie; but the bond and oath of the executor or administrator, and the proof to be made by the witnesses, shall be conformed to the nature of the case. But such will shall be liable to be contested, in the same manner as the original might have been. And in Kentucky, the same provision is enacted in like terms. In

York, with the additional oath of one witness; or in case its validity is called in question, he will be required to substantiate

Virginia, no probate of a will or grant of administration in another state of the Union, or in a foreign country, will give the executor or administrator any right to demand the effects of a decedent, within the jurisdiction of that commonwealth. But in Kentucky, such executor or administrator may sue, upon filing with the clerk of the Court when the suit is brought an authentic *copy of the certificate of probate*, or order granting letters of administration, given in the state in which the executor or administrator resides. But before execution had, bond with surety must be given duly to administer the assets recovered; and the executor may maintain suit, by the authority of letters testamentary granted him in such other state; but an administrator must take out letters within the state, and give the usual bond with surety.

In North Carolina, the copy of a will, registered and deposited agreeably to the laws of the state where the same was made, and properly certified, either according to the Act of Congress passed in May, 1790, or by the proper officer of the said state, and with the further testimonial of the governor or commander-in-chief of the said state, that the person certifying the same is the proper officer, or duly authorized by law, shall be read in evidence in the Courts, and admitted in the same manner as a copy from any of the Registers' or Clerks' Offices of North Carolina.

In South Carolina and Georgia, executors and administrators cannot sue on letters granted in another state. They must take out letters in these states respectively. But, exemplifications of wills are evidence in these states, if authenticated according to the Acts of Congress.

In Tennessee, Ohio, and Mississippi, exemplifications of wills are evidence; and the executor or administrator, having letters in another state, may, on producing a copy of such letters, properly authenticated, maintain an action in the same manner as if they were granted in Tennessee, Ohio, or Mississippi, respectively.

In Alabama, exemplifications of wills are evidence, when properly proven; and an executor or administrator, having letters in another state, may sue here; but before rendition of judgment, he must produce to the Court his letters, authenticated according to the laws of the United States, and, before execution, must give bond with surety for the faithful administration of the money recovered.

In Louisiana, exemplification of a will suffices but to entitle executors or administrators to maintain suit. Letters of curatorship must be taken out in this state.

In Missouri, authenticated copies of wills, proved according to the laws of any of the United States, or territories, or *country*, where the same are made, with the probate thereof annexed or endorsed, being attested by the public or common seal of the Court or Office where the same have been granted and recorded, the same being recorded within this state, shall be as good and valid, to all intents and purposes, as if executed and proved within this state, and be

it more solemnly *per testes*, by the examination of witnesses in the presence of the parties interested, as the widow and next of

admitted in evidence as such. And letters testamentary and of administration, granted out of the state, produced *here*, under the *seal* of the Court or Office granting the same, are sufficient to enable the executor or administrator to sue, as if granted in this state.

In Illinois, an exemplification of a will by the proper officer in other states, is not evidence: the original must be produced. And executors or administrators having letters in another state, must also take out letters in Illinois, in order to sustain suit.

In Indiana, it is expressly provided, that all probates of wills, duly granted in other states, shall be as valid and effectual as if granted in that state; and executors and administrators, having letters in other states, may maintain suit in this.

By Act of Congress passed May 26th, 1790, the records and judicial proceedings of the Courts of any state shall be proved or admitted in any other Court within the United States, by attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every Court within the United States, as they have by law or usage in the Courts of the state from whence the said records are or shall be taken.

On the consideration of this subject, the Supreme Court of the United States have decided that the Orphan's Court, or other Court of Probates, has jurisdiction to allow probate of wills made by persons in foreign states; and that probate, once allowed, operates as a sentence affirming the validity of such wills between the parties, so far as the *lex loci* can give them operation. *Carter's Heirs v. Cutting & Wife*, 8 Cranch, 251, 252.

But an executor or administrator of a person who dies in a foreign country, cannot maintain an action in this country by virtue of letters testamentary granted to him abroad. *Fenwick v. Sears*, 1 Cranch, 259. *Dixon's Ex'rs. v. Ramsay's Ex'rs.* 3 Cranch, 319. 323. *Perkins v. Williams*, 2 Root. Rep. 462. And there is no difference in this respect between an executor and an administrator; for they both derive their power of maintaining suits from the letters testamentary. Thus, an administrator having had letters of administration in Maryland, before the separation of the District of Columbia from Maryland and Virginia, cannot, after the separation, maintain an action, in that part of the District ceded by Maryland, under those letters of administration; but must take out new letters of administration within the District. 1 Cranch, 259. The same point has been determined in Massachusetts. *Goodwin v. Jones*, 3 Mass. Rep. 514. *Stevens, Adm. v. Gaylord*, 11 Mass. Rep. 256. So in the Circuit Court in Connecticut. *Riley v. Riley*, 3 Day's Cases, 74. *Bulls v. Rice, Cameron & Nor.* R. 69. *Champlin v. Tilley & al.* 3 Day's Cases, 303. But it has also been determined in that state, that an administrator appointed according to the laws of

kin (^g). This latter mode of proving a will is seldom resorted to, unless at the instance of a party whose object is to oppose it (^h); but the executor himself may, for greater safety, if he have an interest in the will, elect to have it sanctioned by this more decisive species of evidence, and call on the next of kin to see it propounded (ⁱ).

(^g) 3 Bac. Abr. 59. 2 Bl. Com. 508. (^h) 4 Burn. Eccl. L. 207.
4 Burn. Eccl. L. 205. 207. Godolph. (ⁱ) 4 Burn. Eccl. L. 208. 1 Ought.
65. 1 Ought. 20. Swimb. b. 6. s. 14. 20.

the state where the intestate in his lifetime dwelt, may sue in that capacity in Connecticut, such having been the immemorial usage; even though the administration be granted of the goods and chattels of the intestate, in the state where he died only. *Nicol v. Mumford*, Kirby, 270. And where an administrator *cum testamento annexo* of a person who at the time of his death was domiciled in England, comes into this country, (Massachusetts,) and takes out administration from the Probate Office, according to the Statute, he cannot be cited before the judge of probate, to give an account of assets received by him in England. *Selectmen of Boston v. Boyleston*, 2 Mass. T. R. 386.

Nor is an administrator, not appointed in this state, liable in any action brought against him here, so as to subject the real estate of his intestate to be taken in execution. *Borden v. Borden*, 4 Mass. T. R. 67.

It would seem, that an administrator, who takes out letters of administration in one state, may, *in equity*, be called upon by a creditor to account for the assets in another. *Bryan et al. v. M'Gee*, C. C. April, 1809. MS. Rep. Wharton's Dig. 277.

But though an administrator may not maintain suit on foreign letters, yet, if he have lawful authority to receive a debt due to his intestate, his discharge will be a good bar to an action for the same debt by an administrator in any other state. *Stevens, Adm. v. Gaylord*, 11 Mass. Rep. 256.

In Pennsylvania, an exemplification of a will made in England, and certified generally to have been proved, approved, and registered, in the year 1704, in the Prerogative Court of Canterbury, under the seal of that Court, was allowed to be read in evidence, 1 Dall. 2. and such probate was admitted, though not recorded in the provincial Office. *Ibid.* 66. In *Græme v. Harris*, 1 Dall. 450. it was decided, that letters of administration granted by the archbishop of York were not of sufficient authority to maintain an action in this commonwealth. And in *M'Culloch v. Young*, 4 Dall. 292. 1 Binn. 63. it was determined, "that the Act of Assembly has uniformly been considered not to extend further than to the provinces in this country at the time the Act was passed, and that *Græme v. Harris* turned on that ground. At the same time, it has been as uniformly understood, both before and since the Revolution, that letters of administration granted in a sister state are of sufficient authority to maintain an action here; and such has been the practice, without regard to the particular intestate laws where they have been granted."

[57] When a will is to be thus solemnly proved, two witnesses are indispensable; for generally, by the civil law, the testimony of two persons is requisite, and, therefore, if in the probate of a will that of one witness be disallowed in the ecclesiastical court, no mandamus will lie; for inasmuch as that court has jurisdiction of the subject matter, it has also jurisdiction of the mode of proof, and the proceedings respecting it (^k).

It is not necessary that such witnesses should have read the will, or heard it read, if they can depose that the testator declared that the writing produced was his last will and testament (^l), or that he duly executed the same in their presence.

If the will or codicil be written in the testator's handwriting, although it have neither his name subscribed, nor his seal affixed to it, nor had witnesses present at its publication, yet if the omission of these solemnities afford no presumption of a change of intention (^m), it is of sufficient validity on proof of the handwriting (ⁿ), by the evidence of two persons acquainted with the character of it from having seen him write; if, however, there be a difference of opinion in witnesses as to the handwriting, the ecclesiastical court will receive the evidence of persons skilled in handwriting by comparison, who had not seen him write (^o); but in case there be a single subscribing witness to the will, and who appears to attest it, the testimony of one other person only to the above-mentioned effect is requisite. [S]

(^k) 4 Burn. Eccl. L. 206. Roll. Abr.

500. Twaites v. Smith, 1 P. Wms. 12.

(^l) 4 Burn. Eccl. L. 205. Godolph. 66.

(^m) Supr. 3.

(ⁿ) 2 Bl. Com. 501.

(^o) Beaumont v. Perkins. 1 Phill. Rep.

78.

[3] In Vermont and Massachusetts, a will in writing, purporting to be a disposition of real and personal estate, not attested and subscribed as directed by the Act for devising of lands, &c. shall not be approved and allowed as a will of personal estate only. But in South Carolina, it is specially provided that a will in writing, not sufficient to pass lands, shall be good for chattels.

In Massachusetts, a person interested in the estate of a testator may insist on the production and examination of the *three* subscribing witnesses, if they be living, competent to testify, and under the power of the Court. But if it be impossible to procure any one of the witnesses, or he have become incom-

[58] So, although written by another hand, nor even signed by the testator, if it can be shown to be according to his instructions, and read over and approved by him, it is equally effectual (p).

And so where interrogatories were put to a testator who was *in extremis*, but in full exercise of his testamentary powers, and such interrogatories and his answers were committed to writing, and read over to and approved by him, it was held good (q). But the instructions, to be effectual, must be complete, and not left in an unfinished state, and subject to the further consideration of the testator (r).

In granting probate, the form of the instrument is not looked to by the ecclesiastical court; it is the intention of the party,

(p) 2 Bl. Com. 501. Vid. Limbery *v.* Mason. Com. Rep. 451. 1 Har. & M'Henry, 509.

(q) Green *v.* Skipworth. 1 Phill. Rep. 53.

(r) Devereux *v.* Bullock. 1 Phill. Rep. 60.

petent, the Court will proceed without him, *ex necessitate rei*, and resort to the next best evidence which the case will admit. *Chase et al. v. Lincoln's Ex'r's.* 3 Mass. Rep. 236. *Seno v. Dillingham's Ex'r's.* 12 Mass. Rep. 358.

In the following states, viz. Vermont, Rhode Island, New Hampshire, Connecticut, Massachusetts, New York, New Jersey, and Kentucky, a legacy to a witness of a will is declared null and void, and the witness is qualified to testify. Charges on lands, &c. for the payment of debts to such witness and a creditor, may be examined. But if the legacy be paid or released, or refused upon tender, the legatee is a witness; and such tender and refusal bars conclusively the right of such legatee to recover. If such legatee die in the lifetime of the testator, before he shall have received, released, or refused on tender, his legacy, he is to be deemed a legal attesting witness. In Vermont, the heir at law is not admitted as a witness; in Connecticut, the legacy to him is not avoided; and in Kentucky, it is avoided for so much only as exceeds the amount he would have been entitled to had not the will been made.

A devise or legacy to a witness is absolutely void, so that a conveyance by the devisee to a third person is inoperative. 11 Johns. Rep. 311. If either husband or wife be a witness to a will containing a devise or legacy to the other, such devise or legacy is void, and the party is a competent witness to the will. *Jackson v. Wood*, 1 John. Ca. 63. *Jackson v. Durland*, 2 John. Ca. 314. *Ingersol v. Bradford*, 4 Yeates, 176. *Lightner v. Wike*, 4 Serg. & R. 203. *Bovard v. Wallace*, 4 Serg. & R. 499.

A probate made ex parte, at the instance of the defendant in an issue then pending to try the legality of a will of later date by the same testator, is not valid. *Hantz v. Hull*, 2 Binn. 511.

and whether the instrument appears to be testamentary ; as a paper expressed to be a deed of gift, and declaring "I do hereby give (after my death)" (§), and other cases of the like nature, where the *animus testandi* is clearly shown (¶).

If a testamentary paper be in the handwriting of the deceased, although unfinished and unexecuted, if prevented by the act of God, it will be admitted to probate (¶).

An executor on taking probate swears that the writing contains the true last will and testament of the deceased, as far as the deponent knows or believes, and that he will truly perform the same by paying first the testator's debts, and then the legacies therein contained, as far as the goods, chattels, and credits will thereto extend, and the law charge him ; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the spiritual court at the time assigned by the court, and render a just account thereof when lawfully required.

When the will is proved, the original is deposited in the registry of the ordinary or metropolitan, and a copy thereof in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been proved before him ; and such copy and certificate are usually styled the probate (¶). [4]

(§) Thorold v. Thorold. 1 Phill. Rep. 1.

lor, ib. 1722. Shergold v. Shergold, ib. 1714.

(¶) Green v. Proude. 1 Mod. 117. Rigden v. Vallier. 2 Ves. 252. Corp v. Corp. Prerog. Court, 1793. Hog v. Lashley, ib. 1789. Markwick v. Tay-

(¶) Scott v. Rhodes. 1 Phill. Rep. 12.

(¶) 2 Bl. Com. 508. 4 Burn. Eccl. L. 215. 11 Vin. Abr. 56. pl. 7. Bac. Use of the Law, 67.

[4] In Rhode Island, Vermont, New Hampshire, and Massachusetts, the executor is required to give bond with surety, conditioned that he will return, on oath, a true and perfect inventory of the estate of the testator, into the Probate Office, within such time as the judge of probate shall direct ; and that he will render an account of his proceedings thereon, in the same manner as administrators are by law obliged to do, unless such executor is residuary legatee, when bond may be given by him, conditioned only to pay the debts and legacies of the testator. And if the executor neglects or refuses, for the space of twenty days, to give such bond, the ordinary may grant administration as if the executor had refused the trust. In Connecticut, Delaware, Maryland, Virginia, and Kentucky, a bond is required from the executor, in all respects similar to that given by an administrator.

[59] SECT. VI.

Of the probate of nuncupative wills.

A NUNCUPATIVE will is also capable of being proved (^a). But by the statute of frauds, after six months from the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the testimony, or the substance thereof, were committed to writing within six days after the making of such will. And no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court till fourteen days at the least after the decease of the testator be fully expired.

Nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same if they please (^b). And (as we may (^c) remember) no will in writing concerning any goods or chattels, or personal estates, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only; except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at the least. [1]

(^a) 2 Bl. Com. 500.

(^b) Vid. supr. 4.

(^c) Vid. supr. 16.

[1] See note [2] Chap. I. page 4. A nuncupative will, not made at the habitation of the deceased, nor where he had resided for ten days preceding, but authenticated as the law requires, ought to be established, notwithstanding his being very unwell when he left home, if afterwards he was taken more dangerously ill and died at the place where such will was made. *Marks & Wife v. Bryant & Wife*, 4 Hen. & Mun. 91.

Although, in committing a nuncupative will to writing, within six days from the speaking of the testamentary words, a distinct and independent part thereof be omitted, the residue of the will is not thereby vitiated. *Ibid.*

In New York, the record of a will proved under the Statute is not conclusive upon the heir, so as to prevent the admission of evidence to impeach its validity. The record of a will, like that of a deed, is only *prima facie* evidence of its authenticity. 3 John. Cas. 234.

[60] SECT. VII.

Of the probate of the wills of seamen and marines.

IN regard to the making and probate of the wills of petty officers and seamen in the king's service, and of non-commissioned officers of marines, and marines serving on board a ship in the king's service, by the statute 55 Geo. 3. c. 60. above referred to (^a), no will made by any petty officer or seaman, non-commissioned officer of marines or marine, before his entry into his majesty's service, shall be valid to pass or bequeath any wages, pay, prize-money, bounty-money, or other allowances of money, to accrue due for or in respect of the service of any such petty officer or seaman, non-commissioned officer of marines or marine, in his majesty's navy; nor shall any will made or to be made by any such petty officer or seaman, non-commissioned officer of marines or marine, who shall be or shall have been in the service of his majesty, his heirs or successors, or at any time since, be good, valid, or sufficient to bequeath any such wages, &c. due or to grow due to any such petty officer, &c. unless such will shall contain the name of the ship to which the person executing the same belonged at the time, or to which he last belonged; and also a full description of the degree of relationship or residence of the person or persons to whom or in whose favour, as executor or executors, the same shall be granted or made; and also the day of the month and year, and the name of the place when and where the same shall have been executed; nor shall any such will be good, valid, or sufficient for the purposes aforesaid, unless the same shall, in the several cases hereinafter specified, be executed and attested in the manner hereinafter mentioned; that is to say, in case any such will shall be made by any such petty officer, &c. at any time or times whilst they shall respectively belong to and be on board of any ship or vessel belonging to his majesty, his heirs or successors, as part of the complement thereof, or be borne on the books of any such ship or vessel as a supernumerary, or as an

(^a) Vid. supr. 5.

invalid, or for victuals only, unless such will shall be executed in the presence of and attested by the captain or other officer having the command of such ship or vessel, or (during the absence of such captain or other officer on leave or on separate service) by the commanding officer of such ship or vessel for the time being; and who, in that case, shall state at the foot of such attestation the absence of such captain or other commanding officer from such ship or vessel, at the time of the execution of such will, and the occasion thereof; or in case of the inability of such captain or commanding officer, by reason of wounds or sickness, to attest any such will, then, unless such will shall be executed in the presence of and attested by the first lieutenant or other officer next in command of such ship or vessel, who shall state at the foot of such attestation the inability of such captain or commanding officer to attest the same: in case any such will shall be made by any such petty officer, &c. in any of his majesty's hospitals, or on board of any of his majesty's hospital ships, or in any military or merchant hospital, or at any sick quarters either at home or abroad, unless such will shall be executed in the presence of and attested by the governor, physician, surgeon, assistant-surgeon, agent, or chaplain of any such hospital or sick quarters of his majesty, or by the commanding officer, agent, physician, surgeon, assistant-surgeon, or chaplain for the time being of any such hospital ship, or by the physician, surgeon, assistant-surgeon, agent, chaplain, or chief officer of such military or merchant hospital, or other sick quarters, or one of them: in case any such will shall be made by any such petty officer, &c. on board of any ship or vessel in the transport service, or in any merchant ship or vessel, unless the same shall be executed in the presence of and attested by some commission or warrant officer, or chaplain in his majesty's navy, or some commission officer or chaplain belonging to his majesty's land forces or royal marines, or the governor, physician, surgeon, assistant-surgeon, or agent of any hospital in his majesty's naval or military service, who may happen to be then on board of such transport or merchant vessel, or by the master or first mate of such transport or merchant vessel, or one of them: in case any such will shall be made by any such petty officer, &c. after he shall have been

discharged from his majesty's service ; unless the same (if the party making such will shall then reside in London or Westminster, or within the bills of mortality) shall be executed in the presence of and attested by the inspector for the time being of seamen's wills, or his assistant or clerk ; or unless the same (if the party making such will shall then reside at or within the distance of seven miles from any port or place where the wages of seamen in his majesty's service are paid) shall be executed in the presence of and attested by one of the clerks in the office of the treasurer of the navy resident at such port or place ; or unless the same (if the party making such will shall then reside at any other place in Great Britain or Ireland, or in the islands of Guernsey, Jersey, Alderney, Sark, or Man) shall be executed in the presence of and attested by one of his majesty's justices of the peace, or by the minister or officiating minister or curate of the parish or place in which such will shall be executed ; or unless the same (if the party making such will shall then reside in any other part of his majesty's dominions, or any colony, plantation, settlement, fort, factory, or any other foreign possession or dependency of his majesty, his heirs or successors, or any settlement within the charter of the East India Company) shall be executed in the presence of and attested by some commission or warrant officer or chaplain of his majesty's navy, or commission officer of royal marines, or the commissioner of the navy, or naval storekeeper at one of his majesty's naval yards, or a minister of the church of England or Scotland, or a magistrate or principal officer, residing in any such island, colony, plantation, settlement, fort, factory, or other possession or dependency of his majesty, or settlement within the charter of the East India Company (or if the party making such will shall then reside at any place not within his majesty's dominions, or any settlement, fort, factory, or other foreign possession or dependency of his majesty, his heirs or successors, or any settlement within the charter of the East India Company), unless the same shall be executed in the presence of and attested by the British consul or vice-consul, or some officer having a public appointment or commission, civil, naval, or military, under his majesty's government, or by a magistrate or notary-public, of or near the place where such will shall be executed.

Every will, which hath been, or which at any time or times hereafter shall be made by any such petty officer, &c. at any time or times whilst they were or shall be respectively prisoners of war in parts beyond the seas, are and shall be good, valid, and sufficient; provided such will shall have been executed in the presence of and attested by some commission or warrant officer of his majesty's navy, commission officer of royal marines, physician, surgeon, assistant-surgeon, agent, or chaplain to some naval hospital, or some commission officer, physician, surgeon, assistant-surgeon, or chaplain of the army, or any notary-public.

But no will of any seaman, contained, printed, or written in the same instrument, paper, or parchment, with a letter of attorney, shall be good or available in law, to any intent or purpose whatever.

And all captains and commanders of ships shall, upon their monthly muster books, or returns, specify which of the persons mentioned in the said returns have made or granted any will during that month or other space of time from the preceding return, by inserting the date thereof opposite the party's name, under the head of "Will."

But before any such will shall be attempted to be acted upon or put in force, the same shall be sent to the treasurer of the navy, at the navy pay-office, London, in order that the same may be examined by the inspector of seamen's wills, who, or his assistants, shall immediately on receipt of every such will, duly register the same, in a numerical and alphabetical manner, in books to be kept for that purpose, specifying the date of such will, the place where executed, and the name and addition, names and additions of the person or persons, to whom or in whose favour, as executor or executors, the same shall have been granted or made; and also the names and additions of the witnesses attesting the same, and shall mark the said wills, with numbers corresponding with the numbers made on the entries thereof in the said books; and the said inspector shall take all due and proper means to ascertain the authenticity of every such will; and in case it shall appear to him, or he shall have reason to suspect that any such will is not authentic, he shall forthwith give notice in writing to the person or persons to

whom or in whose favour such will shall have been made, as executor or executors, that the same is stopped, and the reason thereof, and shall also report the same to the treasurer or paymaster of the navy, and shall enter his caveat against such will, which shall prevent any money from being had and received thereon, until the same shall be authenticated to the satisfaction of the said treasurer or paymaster; but if upon such examination and inquiry it shall appear to the said treasurer, paymaster, or inspector, that such will is authentic, the said inspector, or his assistant, shall sign his name to such will, and also put a stamp thereon in token of his approbation thereof.

Where any petty officer, &c. who shall have belonged to any ship or vessel of his majesty, his heirs or successors, has died, or shall hereafter die, having left a will or testament appointing any executor or executors therein, no pay, &c. which may have been due or owing to such testator at the time of his death, shall be paid over to or recovered by such executor or executors, except upon the probate of such will, to be obtained in the following manner; *videlicet*, after such will shall have been so transmitted, registered, inspected, and approved, as hereinbefore directed, the inspector of seamen's wills shall issue or cause to be issued, to the person named and described as executor or executrix of such will, a check in lieu thereof, containing directions to return the same, upon the testator's death, to the treasurer or paymaster of his majesty's navy; the form of which check is set forth in the act.

And in the event of the testator's death, the minister, officiating minister, or curate of the parish in which the executor or executrix may then reside, shall, upon being applied to for his signature to the certificate at the foot of the check, examine such executor or executrix, and such two inhabitant householders of the parish, as may be disposed to sign the first certificate on the check, touching the claim of the executor or executrix; and being satisfied of his or her being the person described as executor or executrix in the check, the executor or executrix shall subscribe the application subjoined to the check (the blank therein being first filled up agreeably to the truth), in the presence of the said minister, officiating minister, or curate; and the said two inhabitant householders shall also subscribe the

said first certificate on the check (the blanks therein being first filled up agreeably to the truth) in the like presence; for which respective purposes the executor or executrix, and the house-holders, shall attend at such time and place, times and places, as the minister, officiating minister, or curate shall appoint; and the minister, officiating minister, or curate shall sign the second certificate on the check (the blanks therein, and in the description thereunto subjoined, being first filled up agreeably to the truth); and the executor or executrix shall, before his or her examination, or his or her signing the said application, pay to the minister, officiating minister, or curate, a fee of two shillings and sixpence for his trouble on the occasion; and the application and certificates, being completed according to the directions therein given, shall be transmitted by the minister, officiating minister, or curate, by the general post, addressed to the treasurer or to the paymaster of the navy, London; and the original will having been passed and stamped in the manner directed by the act, the inspector of seamen's wills, or his assistant, shall note thereon the amount of the wages due to the deceased, as calculated on the search sent to the inspector from the navy office, and shall forward such will to a proctor in *Doctors' Commons*, in order to his obtaining probate thereof: And in case the executor or executrix shall not reside within the bills of mortality, the inspector shall also forward to such proctor a letter addressed to the minister, in the form or to the effect stated in the act.

And such proctor having received the will and the letter so written by the inspector (in case such letter shall be necessary), shall immediately sue out the previous commission or requisition, or take such other proper and legal steps as may be necessary towards enabling the executor or executrix, so applying for probate of the will, to obtain the same; and shall enclose in the letter such previous commission or requisition, or other legal or necessary instrument, with instructions for executing the same, and also a copy of the will; and the letter and inclosures shall be forwarded to the minister by the general post, agreeably to the address put thereon by the inspector of seamen's wills.

The minister immediately upon the receipt of such previous commission or requisition, or other instrument, is to take such

steps as to him may seem proper or necessary for procuring the execution of such previous commission or requisition, or other instrument, directed by the proctor employed in *Doctors' Commons* to be executed, and the same being so executed, he is to transmit the same to the treasurer or to the paymaster of his majesty's navy, London; and if the person applying for such probate of will, shall be and reside at a distance from the place where wages, prize-money, or other allowances of money due to the deceased are payable, he is to specify and describe the receiver general of the land tax, collector of the customs, collector of the excise, or clerk of the cheque, who may be most convenient or nearest to the person applying for such probate; and the said treasurer, paymaster, or inspector, shall, immediately upon receipt thereof, send the said previous commission or requisition, or other legal instrument, executed by the person applying for the probate as aforesaid, to the aforesaid proctor in *Doctors' Commons*, who, in pursuance thereof, is forthwith to sue out and procure such probate.

And if any proctor or officer of the ecclesiastical court shall take more for his charges than the sums by the act directed to be taken in the different events therein specified, he shall forfeit fifty pounds; or if he shall be aiding or assisting in procuring probate of a will, or letters of administration, for the purpose of enabling any person to receive such wages, prize-money, or allowance of money, otherwise than in the manner prescribed by these acts, such proctor or other officer shall forfeit five hundred pounds, and for ever after be incapable of acting in any capacity in any ecclesiastical court in Great Britain.

[65] SECT. VIII.

Of the probate under special circumstances.

IF the executor be infirm, or live at a distance, it is usual to grant a commission or requisition to the archbishop, or bishop, in England or Ireland (as the case may be), or if in Scotland,

the West Indies, or other foreign parts, to the magistrates or other competent authority, to administer the oath to be taken previous to granting probate of the will^(a). Otherwise if the executor do not within a reasonable time appear voluntarily, he may, as I have already mentioned, pursuant to the statute 21 H. 8. c. 5.^(b) be cited by the ordinary *ex officio* to prove or refuse the testament. In case of non-appearance on the process he may be excommunicated, and the goods of the deceased sequestered until the probate^(c); or administration with the will annexed may be granted, in pain of his contumacy, provided an intimation to that effect be contained in the process.

But the practice of issuing such citations is now become obsolete, unless at the suit of the parties interested: if, however, the executor act, and neglect to take probate within six months [66] after the death of the testator^(d), by the above-mentioned statute of 37 G. 3. c. 90. he incurs the penalty of fifty pounds. [1]

On the other hand, the ordinary is bound to grant probate of the will; and if the executor accept the office, and claim the probate, in case of the ordinary's refusal to grant it, a writ of *mandamus* may issue from the court of King's Bench to compel him^(e): for although the spiritual court is to determine whether there be a will or not, yet, if there be a will, the executor has a temporal right, nor shall any terms be imposed on him except such as the will prescribes^(f). But if the will be litigated, the bishop may, in his return to the writ, state that a suit is depending before him in regard to the same, and not yet determined. And such return will be sufficient^(g).

This jurisdiction the metropolitan or ordinary may exercise either himself, or by his official; for it is merely a ministerial act, and concerns him not in his spiritual capacity^(h).

^(a) Vid. 4 Burn. Eccl. L. 208.

^(f) Rex v. Raines, Ld. Raym. 361.

^(b) Supr. 41.

^(g) Marriott v. Marriott, Stra. 672.

^(c) Vid. 4 Burn. Eccl. L. 204.

^(h) Sir Rich. Raine's Case, Ld. Raym.

^(d) Supr. 43.

262. Rex v. Hay, Burr. 2295. 4 Burn.

^(e) 4 Burn. Eccl. L. 204.

Eccl. Law, 205.

^(h) 3 Bac. Abr. 39. Archbishop of Canterbury v. House, Cwpw. 140.

The power of granting probates is not local, but is annexed to the person of the archbishop or bishop; and therefore a bishop, or the commissary of a bishop, while absent from his diocese, [67] may grant probate of wills respecting property within the same; or if an archbishop or bishop of a province or see in Ireland happen to be in England, he may grant probate of wills relative to effects within his province or diocese (ⁱ).

If the see be vacant, or in case of the suspension of the bishop or archbishop, the dean and chapter are to grant the probate (^k).

The proving of a bishop's will, although he left goods only within his own jurisdiction, belongs to the archbishop (^l).

If there be several executors, and one take probate, he takes it with a reservation to the rest. If another apply for that purpose, an engrossment of the original will is to be annexed to the second probate in the same manner as to the first, and in the second grant the first grant is to be recited. And so of the rest. And this is styled a double probate (^m).

Where several executors are appointed, as formerly mentioned (ⁿ), with separate and distinct powers, yet, as there is but one will, one probate shall be sufficient (^o).

[68] Where probate of the will of a married woman is granted to her executor, if he be not her husband, it is limited to the property over which she had a disposing power; and the instrument from which such power is derived must be produced; unless the husband, either in person or by proxy, consent to a general probate's being granted to her executor.

If a will be limited to any specific effects of a testator, the probate shall be also limited, and an administration *cæterorum* granted.

The interest vested by the will of the deceased in the executor may, if he take out probate, be continued and kept alive by the will of the same executor, so that the executor of A's exe-

(ⁱ) 3 Bac. Abr. 39. 11 Vin. Abr. 78.
Cro. Car. 53.

(^l) 11 Vin. Abr. 74. 4 Inst. 335. Supr.
53.

(^k) 3 Bac. Abr. 39. Roll. Abr. 908.
11 Vin. Abr. 74, 75. 77. Young v.
Case, Lutw. 30.

(^m) 4 Burn. Eccl. L. 201.
(ⁿ) Vid. supr. 36.
(^o) 3 Bac. Abr. 30. Off. Ex. 13.

cutor is to all intents and purposes the executor and representative of A himself^(p), and may be directly so named in legal proceedings^(q). For the power of an executor is founded on the special confidence, and actual appointment of the deceased. Such executor therefore may transmit that power to another in whom he has equal confidence. And, so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator, in how-[69] ever numerous a succession. Nor is a new probate of the original will in any of the subsequent stages requisite^(r).

If there be several co-executors, and they all prove, the interest goes only to the executor of the last survivor; and although such survivor refused to prove in the lifetime of the other executors, he may take out probate after their death; and in that case the interest will be equally transmitted to his executor. But if such surviving executor renounce after their death, administration shall be granted, and then his executor will have no title to the original executorship^(s). [2]

If A appoint B and C his executors, and die, and B make J. S. his executor, and die, and afterwards C dies intestate; the executor of B shall not be the executor of A, because the executorship vested solely in C as survivor; and as he died intestate, administration must be taken out to A^(t).

Wills which concern the personal estate only, are subject to the jurisdiction of the ecclesiastical courts^(u).

(p) 2 Bl. Com. 506. Com. Dig. Admon. B. 6. 11 Vin. Abr. 63. 90. 107. Off. Ex. Suppl. 140. Plow. 525. Shep. Touch. 464.

(q) Com. Dig. Admon. G. 1. Powley and Sear's Case. Leon. 275.

(r) Wankford *v.* Wankford. 1 Salk. 309.

(s) 11 Vin. Abr. 68, 69. 114. Wankford *v.* Wankford, 1 Salk. 307. House *v.* Lord Petre, 311. Pawlet *v.* Freak. Hard. 111. Com. Dig. Admon. B. 1.

(t) 11 Vin. Abr. 88. Off. Ex. 101.

(u) 4 Burn. Eccl. L. 195.

[2] In Massachusetts, Rhode Island, Vermont, and Maryland, by Statute, the executor of an executor is not of course the executor of the first testator. But administration *de bonis non* is granted at the discretion of the judge of probate.

Where the will respects lands merely, the spiritual court ought not to grant probate; and if there be a suit to compel [70] it, a prohibition will lie (v).

But when the will is of a mixed nature, that is, relates both to real and personal property, the probate of it shall be entire in the spiritual court. (w) [3]

A will may be proved with a reservation as to a particular legacy. And in such case, if there be a decree against such legacy as a forgery or interpolation in the ecclesiastical court, the will shall be engrossed without it, and so annexed to the probate (x).

The will of a party who has been long absent from this country may be proved, if he be generally understood to be dead, and the executor will take upon himself to swear that he believes him to be so (y).

If the executor named in the will be unknown or concealed, administration may, after due process, be granted till he appear and claim the probate (z).

[71] If the will be lost, two witnesses, superior to all exception, who read the will, prove its existence after the testator's death, remember its contents, and depose to its tenor, are sufficient to establish it (a).

(v) 4 Burn. Eccl. L. 195. Netter v. Brett, Cro. Car. 396. Habergham v. Vincent, 2 Ves. jun. 230.

(w) Netter v. Brett, Cro. Car. 396. 11 Vin. Abr. 57. 60. 117. Partridge's Case, 2 Salk. 552. 3 Salk. 22.

(x) 4 Burn. Eccl. L. 209. Plume v. Beale. 1 P. Wms. 388.

(y) Off. Ex. Suppl. 63. Swinb. Part 6. s. 13.

(z) 4 Burn. Eccl. L. 202. Roll. Abr. 907. and vid. infr.

(a) 4 Burn. Eccl. L. 209.

[3] Wills, whether relating to real or personal estate, may be proved before the officer of probate, in every state. And in New York, any person interested in lands may at his expense cause the same to be proved in the Court of Common Pleas of the county in which the real estate lies; and if the estate lies in several counties, then to be proved in the Supreme Court.

The certificate of the Register, that a will of land had been duly proven and approved before him, and a copy thereof annexed, is *prima facie* evidence of such will, though a copy of the probate is not set out. *Logan v. Walts*, 5 Serg. & R. 212.

So, where the testator had delivered his will to A to keep for him, and four years afterwards died, when the will was found gnawn to pieces by rats, and in part illegible, on proof of the substance of the will by the joining of the pieces, and the memory of witnesses, the probate was granted (^b).

A will is to be construed by the court without regard to the instructions given for preparing it (^c). [4]

(^b) Off. Ex. Suppl. 215. 7 Bac. Abr. (^c) Murray v. Jones, 2 Ves. and Bea. 320. in note. *Wilmot v. Talbot*, 3 Har. 318.
& M'Hen. 2.

[4] The following rules of construction have been laid down by the Courts.

The intention of the testator shall govern in the construction of a will, in all cases except where the law overrules the intention; and this is reducible to four instances: 1. Where the devise would make a perpetuity; 2. Where it would put the freehold in abeyance; 3. Where chattels are limited as inheritances; and 4. Where a fee is limited on a fee. *Ruston v. Ruston*, 2 Dall. 244. 2 Yeates, 60. *Findlay v. Riddle*, 3 Binn. 149. *Less. of Lynn & al. v. Daines*, 1 Yeates, 518. *Holmes v. William*, 1 Root. R. 332. But the intention of the testator must be collected from the will itself. *Mann v. Mann*, 14 Johns. Rep. 1. And parol testimony is inadmissible to explain, vary, or enlarge the words of the will, unless in case of a *latent ambiguity*, or to rebut a resulting trust. *Ibid.*

Every sentence and word in a will must be considered, in forming a judicial opinion upon it. *Turbett v. Turbett*, 3 Yeates, 187.

The word *estate* in a will carries every thing, unless restrained by particular expressions. *Ibid.* So also the word *property*. *Pearson v. Horwell*, 17 Johns. R. 281. The word *issue* is either a word of purchase or limitation, as will best effectuate the testator's intention. So *heirs*, and *heirs of the body*, have likewise been restrained as words of purchase. *Findlay v. Riddle*, 3 Binn. 160.

Parol evidence is not admissible to increase or abridge the effect of words used in a written will. *Torbert & al. v. Twining*, 1 Yeates, 432.

A will cannot be good and approved in part. *Starr v. Starr*, 2 Root. R. 303.

An alteration, whether material or immaterial, made in a will by any person claiming under it, renders it void; but whether a material alteration by a stranger has that effect, *Quere. Malin v. Malin*, 16 Johns. Rep. 293.

The testator having drawn his pen through certain words in the draft of his will, and the writer of the draft having inserted therein, in the presence of the testator, and with his assent, certain other words (mere expletives) which were erased by him after the testator's death, these erasures and interlineations were held not to vitiate the instrument. *Cogbill v. Cogbill*, 2 Hen. & Mun. 467.

But the probate is conclusive as to personal estate only, while the letters testamentary remain unrevoked; as to realty, it is only *prima facie* evidence. *Coates v. Hughes*, 3 Binn. 498. *Vangordon v. Vangordon*, cited 3 Binn. 506.

If the testator resided in Scotland, and left effects there and in England, the will is proved in the first instance in the court of great sessions in Scotland, and a copy duly authenticated being transmitted hither, it is proved in the prerogative court, and deposited as if it were an original will.

So in such case, if the testator resided in Ireland, the will is proved in the spiritual court of that country; or if in the East or West Indies, in the probate court there, and a copy transmitted, proved, and deposited in the same manner.

Where the testator was resident in England, not merely as a visitor, and has left property in the plantations, the judge of [72] probate in the plantations is bound by a grant of probate by the prerogative court here, and ought to make a similar grant to such grantee (^d).

If a will be made in a foreign country, disposing of goods in England, it must be proved here (^e). But if the effects were all abroad, and the will be proved according to the custom of the country where the testator died, it is sufficient. And the executor may plead such matter to a bill filed against him by the administrator, for an account of the deceased's personal estate (^f).

If a will be in a foreign language, the probate is granted of a translation of the same by a notary-public.

SECT. IX.

Of caveats, revocation of probates, and appeals.

WHEN the will is opposed, it is the practice to enter a caveat in the spiritual court to prevent the probate. And it is said that, by the rules of that court, the caveat shall stand in force for three months, and that, while it is pending, probate cannot [73] be granted; but whether the law recognises a caveat and allows it so to operate, or whether it does not regard it as a

(^d) *Burn v. Cole.* Amb. 415.

(^e) 11 Vin. Abr. 58. Vid. infr.

(^f) 11 Vin. Abr. 59, 69. *Jauncy v. Sealey.* 1 Vern. 397.

mere cautionary act by a stranger to prevent the ordinary from committing a wrong, is a point on which the judges of the temporal courts have differed (^s). [1]

Probate of a will is suspended by appeal, but it cannot be stayed at the suit of a creditor, till a commission of appraisement issued be returned (^h) ; for by the statute 21 H. 8. c. 5. the probate is to be granted with convenient speed, without any frustratory delay.

If a probate have been granted by the wrong jurisdiction, it is cause of reversal, or nullity, according to the distinction before stated (ⁱ).

So if the will be fraudulently proved, either in the common form, that is to say, by the oath of the executor, or more solemnly by the examination of witnesses, on such fraud being shown, the spiritual court will revoke the probate. So also it may be vacated on proof of a revocation of the will on which it was granted, or of the making of one subsequent (^k). And where probate has been granted of the will of a person *supposed* to be deceased, upon application to the court by motion, the judge will by interlocutory decree revoke the probate so granted in error, and upon petition of the party will decree the will and cancelled probate to be delivered up to him (^l).

(^s) 3 Bac. Abr. 41. Offley v. Best. 1 Lev. 186.

(ⁱ) Off. Ex. 48 Vid. supr. 53.

(^k) Ibid. 48.

(^h) 11 Vin. Abr. 63. 4 Burn. Eccl. L. 230. Rex v. Bettsworth. Stra. 857.

(^l) In re Charles James Napier, 1 Phill. Rep. 83.

[1] The practice of entering a *caveat* with the officer, when there is an intention on the part of any one interested to contest the validity of the will or the right of administration, necessarily exists in all the states. In New York, on the entry of a *caveat*, the surrogate is directed to summon the parties and witnesses, and to determine the matters in controversy. In Pennsylvania, the entry of the *caveat* causes the matter in dispute to be brought before the Register's Court; and at the request of either of the parties, this Court may send an issue to be tried by the Common Pleas, which being tried and returned, the Register's Court takes the fact as settled. With regard to *personal* estate, such decision is *absolute*; but it is not deemed conclusive with respect to *real* estate, and the party dissatisfied may have the title tried in *ejectment*. *Spangler v. Rambler*, 4 Serg. & R. 193.

An appeal (⁽ⁿ⁾) in regard to probates, by statute 24 H. 8. [74] c. 12. lies from the court of the archdeacon, or his official (if the matter be there commenced), to the bishop of the diocese; and by virtue of the same statute, from the bishop diocesan, or his commissary, to the archbishop of the province, within fifteen days next after sentence. When the cause is commenced before the archdeacon of the archbishop, or his commissary, by the same statute there may be an appeal within the same period to the court of arches, or audience of the archbishop; and from the court of arches or audience, within fifteen days next after sentence given to the archbishop himself; and in case the king himself be a party in such suits, the appeal shall be, within fifteen days next after sentence given to all the bishops of the realm, in the upper house of convocation assembled. By that statute, and also by statute 25 H. 8. c. 19, appeals to the pope are prohibited, and by the latter statute are given from the archbishop's court to the king in chancery, where a commission shall be awarded under the great seal, to certain persons to be named by the king for the determination of the appeals; and those commissions are called delegates, inasmuch as they are delegated by the king's commission. And further, although this last cited statute declare the sentence of the delegates definitive, the king, on complaint to him made, may grant a commission of review to revise the sentence of the delegates (^(o)); because the pope, as supreme head by the canon law, used to [75] grant such commission; and such authority, as the pope heretofore exercised, is now annexed to the crown by statute 26 H. 8. c. 1. and 1 Eliz. c. 1. But it is not matter of right, which the subject may demand *ex debito justitiae*, but merely a matter of favour, which is never granted but under special circumstances (^(p)).

Before revocation of a probate, the court will not grant a new one (^(q)).

(ⁿ) Com. Dig. Prerogative.

(^a) Off. Ex. Suppl. 127. 129. 3 Bl. Com. 64—67.

(^o) 3 Bl. Com. 67. Matthews *v.* Warner. 4 Ves. jun. 205.

(^p) 4 Burn. Eccl. L. 193. Rains *v.*

Comm. of Dioc. of Canterb. 7 Mod. 146.

Where probate granted by the special court is affirmed on an appeal to the arches or delegates, the usage is to send the cause back. But when the first sentence is reversed, the court below shall be ousted of its jurisdiction, and the court which reverses it shall grant probate *de novo* (q). [2]

SECT. X.

The effect of a probate.—Loss of the same.—What is evidence of probate.—Effect of its revocation.

THE probate thus passed, although it does not confer, yet authenticates the right of the executor, for courts of law or equity take no judicial notice of any executor until he has proved the will. But it shall have relation to the time of the testator's death (r). [1]

(q) 11 Vin. Abr. 76. Com. Dig. Admon. B. 2. 2 Roll. Abr. 233.

(r) 11 Vin. Abr. 205. Off. Ex. 49. Hen-
sler's case. 9 Co. 38. Comber's case.

1 P. Wms. 767. Hudson *v.* Hudson.
1 Atk. 461. Ca. in Ch. 2 pl. 56. Smith
v. Milles. 1 T. Rep. 480. Rex *v.* Ne-
therseal. 4 T. Rep. 260.

[2] An appeal lies from the judge of probate to the Supreme Court, in all cases, in the states of Massachusetts, Rhode Island, Connecticut, New Hampshire, and Vermont, if made within sixty days after the decree or order: from the surrogates to the judge of the Court of Probates, in New York, if entered within fifteen days next after sentence given or decree made.

In Pennsylvania, an appeal lies from the Register to the Register's Court, composed of the Register and two or more judges of the Common Pleas, if made within two years, with the usual reservation to persons within age, non compos, &c; and from the Register's Court, an appeal lies to the Supreme Court, if made within one year.

In Virginia and Kentucky, the appeal is from the Probate Court to the Court of Chancery: in Georgia, from the Court of Ordinary to the Superior Court.

In Indiana, an appeal lies from the decision of the Clerk to the judges of the Circuit Court.

[1] The appointment of an executor, and his acceptance of the office, constitute a complete legal owner of the personal estate of the deceased; and a temporary administration cannot be granted by the ordinary (except by some spe-

[76] If the will be proved in common form, it may at any time within thirty years be disputed; if in the more formal mode, and all persons interested are made parties to the suit, and there be no proceedings within the time limited for appeals, it is liable to no future controversy^(s).

So long as the probate remains unrevoked, the seal of the ordinary cannot be contradicted, for the temporal court cannot pass a judgment respecting a will in opposition to that of the ecclesiastical court^(t); and therefore if a probate under seal be shown, evidence will not be admitted that the will was forged, or that the execution of it was procured by fraud, or that the testator was *non compos mentis*, or that another person was executor; for these are points which are exclusively of spiritual cognizance; but it may be shown that the seal was forged, or that there were *bona notabilia*, for such evidence is no contradiction to the seal, but admits, and avoids it^(u). [2]

Such then being the nature of a probate, inasmuch as it is a judicial act of the court having competent authority; and is conclusive till it be repealed, and a court of common law cannot admit evidence to impeach it; it was determined in a recent case, in opposition to some old decisions^(v), that payment of [77] money to an executor who had obtained probate of a forged will, was a discharge to the debtor of the intestate, although

(s) 4 Burn. Eccl. L. 207. Godolph. 62.

(u) Marriott v. Marriott, Stra. 671, 672.

(t) House v. Lord Petre, 1 Salk. 311.

4 Burn. Eccl. L. 196.

Griffiths v. Hamilton, 12 Ves. jun.

(v) 1 Roll. Abr. 919. anon. Com. Rep.

See also 1 P. Wms. 388. 548. in note.

152. Vid. 11 Vin. Abr. 89.

cial statute) unless the executor is under an actual or legal disability to perform the functions of his office. *Griffith v. Frazer*, 8 Cranch, 9. 21.

The appointment of an executor vests the whole personal estate in the person so appointed, who holds as trustee for the purposes of the will, but has the legal title in all the chattels of the testator; and for the purposes of administration, he is as much the legal proprietor of them as was the testator himself whilst alive. *Ibid.*

But until probate and letters testamentary granted, the executor cannot obtain judgment, because it cannot appear that he is executor. *Ibid.*

[2] See note [1] page 50.

the probate were afterwards revoked and administration granted to the next of kin (^w).

And on the same principle it is holden, that pending a suit in the spiritual court respecting the validity of a will, an indictment for forging it ought not to be tried; and it is the practice to postpone the trial till that court has given sentence (^x).

But a payment of money under probate of a supposed will of a living person would be void, because in such case the ecclesiastical court has no jurisdiction: and the probate can have no effect. The power of the ordinary extends only to the proving of wills of persons deceased (^y).

Where the probate is lost, the spiritual court never grants a second, but merely an exemplification of the probate from its own records, and such exemplification is evidence of the will having been proved (^z).

The copy of the probate of a will of a personal property [78] is evidence, inasmuch as the probate is an original taken by authority, and of a public nature (^a).

The register's book, or, as it is sometimes styled, the ledger-book, in the spiritual court, is evidence that there was such will, in case of its being lost (^b).

A copy of the ledger-book seems also to be sufficient proof for the same purpose; since such book is a roll of the court, and therefore a copy of it is not a copy of a copy, as hath been erroneously supposed (^c).

If issue be taken on a probate of a will, it shall be tried by a jury (^d).

The probate, or, as it is sometimes called, the letters testamentary, may be revoked either on a suit by citation, or on appeal to reverse a sentence by which they are granted; and,

(^w) *Allen v. Dundas*, 3 Term Rep. 125.

Raym. 154. *Law of Ni. Pri.* 245, 246.

(^x) *3 Bac. Abr.* 34. *Rex v. Vincent*, 1

Stra. 481. *4 Burn. Eccl. L.* 219.

Stra. 481. *Rex v. Rhodes*, 2 *Stra.* 703.

(^b) *4 Burn. Eccl. L.* 218. *St. Legar v. Adams*, *Ld. Raym.* 731.

(^y) *Allen v. Dundas*, 3 Term Rep. 130.

(^c) *L. of Ni. Pri.* 246.

(^z) *Shepherd v. Shorthose*, *Stra.* 412.

4 Burn. Eccl. L. 219.

4 Burn. Eccl. L. 219.

(^d) *Off. Ex. Suppl.* 9. *Case of Abbot*

(a) *3 Salk.* 154. *Hoe v. Nathorpe*, *Ld.*

of Strata, 9 *Co. Rep.* 31.

in case of revocation, all the intermediate acts of the executors shall be void. [3]

But where a widow possessed herself of the personal estate as executrix under a revoked will, and paid debts and legacies [79] without notice of the revocation, she was allowed those payments in equity; but leases which she had granted were ordered to be set aside (e).

Where B, a married woman, who was the sole executrix of her late husband A, made a will merely executing a power

(e) 3 Bac. Abr. 50. 1 Chan. Ca. 126.

[3] Letters testamentary, when once granted, are not revocable by the ordinary. He cannot annul them, nor transfer the legal interest of the executor to any other person. The cases in which administration has been granted notwithstanding the existence of a will, are cases in which it is not apparent that there is any person possessing a right in the chattels of the testator, or in cases in which that person is legally disqualified from acting. Thus, where administration is granted pending a dispute respecting a will, it is not certain that there is an executor, or that there is a will. So if administration be granted during the minority of an executor, it is because the executor is legally disqualified from acting, and indeed has not taken and could not take upon himself the trust. So in the case of an absent executor, who has not yet made probate of the will, and qualified. He having as yet no evidence that he is executor, nor yet being able to act as one, and having it in his power to renounce the office; the ordinary is not yet deprived of that power which he possesses, to appoint a person to represent a dead man who has no representative.

Though the ordinary may have jurisdiction to grant administration in cases where the executor has not qualified, and his act though erroneous may be valid till repealed, yet in cases where there is a qualified executor, the ordinary can have no jurisdiction, and his act in itself is an absolute nullity. *Griffith v. Frazer*, 8 Cranch, 9. 21. There is no distinction in this respect between the grant of an *absolute*, and temporary administration. Such grant is absolutely void, for want of jurisdiction. And this defect of jurisdiction renders such administration a nullity, where it is collaterally and incidentally brought in question before the Court. *Ibid.*

In Virginia, the validity of the probate may be contested by bill in Chancery, within seven years, by any person who had not appeared and contested it before the ordinary. And though he had appeared and contested the probate, he may file a bill on the ground of fraud unknown to him at the time of the probate. *Ford v. Gardner*, 1 Hen. & Mun. Rep. 73. And though a probate may have been admitted to record in a district Court, a county Court in Chancery may try its validity.

given to her by a marriage settlement, but appointed C executrix *generally*, and the ecclesiastical court granted probate of her will in the *general form*; it was held, that the general probate of the will of B transmitted to C the representation of A without an administration *de bonis non* (¹).

(¹) Barr *v.* Carter, 2 Cox's Rep. 429.

[80] CHAP. III.

OF THE APPOINTMENT OF ADMINISTRATORS.

SECT. I.

*Of general administrations,—origin thereof,—who entitled.—
Of consanguinity.*

IN case a party makes no testamentary disposition of his personal property, he is said to die intestate^(a); the consequences of which are now to be considered.

In ancient times the king was, on such event, entitled to take possession, by his officers, of the effects, as the *parens patriæ*, and general trustee of the kingdom, in order that they might be applied in the burial of the deceased, in the payment of his debts, and in a provision for his wife and children; or if none, then for his next of kin^(b). This prerogative was most probably exercised in the county court; it was also delegated as a franchise to many lords of manors and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors in their own courts baron and [81] other courts, or, as we have seen^(c), to grant probate of their wills, in case they have made any disposition^(d).

This power was afterwards vested by the crown in the prelates, who, on a notion of their superior sanctity, were, by the superstition of the times, conceived capable of disposing of the property most for the benefit of the deceased's soul^(e). The effects were therefore committed to the ordinary, and he might seize and keep them without wasting, and after the *partes rationabiles*, or two thirds belonging to the wife and children were deducted^(f), might give, alien, or sell the remainder at his pleasure,

(a) 2 Bl. Com. 494.

(b) 2 Bl. Com. 494. 9 Co. 38 b.

(c) Vid. supr. 50.

(d) 2 Bl. Com. 494. 9 Co. 37 b.

(e) Perkins, sect. 486. Plowd. 277. 9

Co. 38 b.

(f) 2 Bl. Com. 491. 495. 516. 2 Inst.

and dispose of the money in pious uses. If he did otherwise, he violated the trust reposed in him as the king's almoner within his diocese (^g). The jurisdiction of proving wills of course fell into the same channel, since it was thought reasonable that they should be proved to the satisfaction of him whose right of distribution they effectually superseded (^h).

But his conduct did not justify the presumption which had been thus formed in his favour. The trust so confided to him, he did not very faithfully execute (ⁱ). He converted to his own use, under the name of church and poor, the whole of such residue, without even paying the deceased's debts. To redress such palpable injustice, the statute of *Westminster* 2. or the 13 *E. 1. c. 19.* was passed ; by which it is enacted, that the ordinary is bound to pay the debts of the intestate, so far as his goods will extend, in the same manner as executors are bound, in case the deceased has left a will ; an use, as Mr. Justice *Blackstone* styles it, more truly pious than any requiem, or mass for his soul (^k).

Although the ordinary were now become liable to the intestate's creditors, yet the residue, after payment of debts, continued in his hands, to be applied to whatever purposes his conscience might approve. But as he was not sufficiently scrupulous to prevent the perpetual misapplication of the fund, the legislature again interposed, in order to divest him and his dependents of the administration. The stat. 31 *E. 3. c. 11.* therefore provides, that in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, and they are thereby put on the same footing in regard to suits, and to accounting, as executors appointed by will (^l).

Such is the origin of administrators. They are the officers of the ordinary, appointed by him in pursuance of the statute, which selects the next and most lawful friends of the intestate. [83] But the stat. 21 *H. 8. c. 5.* allows the ecclesiastical judge a little more latitude, and empowers him to grant administration either to the widow or next of kin, or to both of them, at

(^g) *Plowd.* 277.

(^k) *Ibid.* 495.

(^h) 2 *Bl. Com.* 494.

(^l) 2 *Bl. Com.* 495, 496. 3 *Bac. Abr.* 54.

(ⁱ) *Ibid.* 491. 495.

Raym. 498.

his own discretion; and where two or more persons are in the same degree of kindred, in case they apply, gives him his election to accept whichever he pleases.

Letters of administration, then, must be granted by the ordinary to such persons, as the statutes 31 E. 3. & 21 H. 8. point out^(m), that is, according to the former statute, to the next and most lawful friends of the intestate; according to the latter, to the widow, and next of kin, or both, or either of them.

What parties fall within the first description, it was the province of the courts of common law to determine⁽ⁿ⁾, and they have interpreted such friends to mean in the first place the husband, if he were not entitled at common law, and secondly, the next of blood, under no legal disabilities^(o).

First, the ordinary is bound to grant administration of the effects of the wife to the husband^(p).

Various opinions have indeed been held with regard to the husband's title to administer. Some have maintained that he [84] has no such exclusive right, either at common law, or by virtue of the statutes; but that the ordinary may refuse the administration to him, and may elect to grant it to the next of kin of the wife^(q). By others, it has been asserted, that he is entitled under the equity of the stat. of the 21 H. 8. whereby the ordinary is directed to grant administration of the husband's effects to the wife, or next of kin, or to either^(r). By a third class, it has been insisted, that although the husband have not been expressly named in the stat. 31 E. 3. nor does he answer the description of next of kin to the wife, yet he is included under the denomination of the next and most lawful friend of the intestate; and that thus he supports his claim, not on the common law, nor, as described *eo nomine*, by the statute, but as comprehended within its general provision^(s). By a fourth, it is alleged, and the doctrine is recognised, in a recent

^(m) 2 Bl. Com. 504.

^(r) 11 Vin. Abr. 84. in note.

⁽ⁿ⁾ 3 Bac. Abr. 54. 11 Vin. Abr. 93.
Thomas v. Butler, 1 Ventr. 218.

^(s) Fawtry v. Fawtry. 1 Salk. 36. 11
Vin. Abr. 73. 84. in note. 116. Black-

^(o) 2 Bl. Com. 496. 9 Co. 39 b.

borough v. Davis. 1 P. Wms. 44. 4

^(p) 11 Vin. Abr. 86. Blackborough v.
Davis, 1 P. Wms. 44.

Burn. Eccl. L. 235. Vid. Fettiplace v.
Gorges. 1 Ves. jun. 49.

^(q) Johns v. Rowe. Cro. Car. 106.

case, by Lord Loughborough, C. (t), that he is entitled at common law, *jure mariti*, and that his right is not derived from any of the statutes, but, on the contrary, is supposed by them, and exists independently of them all. However, to speculate on these points is useless to the present purpose, since the husband's right [85] to administer, on whatever foundation, is now beyond all question established.

The stat. 29 *Car. 2. c. 3.* contains a clause, that the statute of distributions, the 22 & 23 *Car. 2. c. 10.* hereafter to be discussed, shall not prejudice such title of the husband, under an apprehension that it might be considered to be thereby affected. And though a marriage was voidable as being within the prohibited degrees, but not declared void in the lifetime of the parties, the marriage is valid for all civil purposes, and the husband is entitled as a civil right to administration of her effects (v).

Such is the general right of the husband to the administration of the wife's effects; but this right may, in certain cases, be controlled or varied (w). If the husband part with all his interest in his wife's fortune, he shall not be entitled to the administration; as, where a wife had a power to make a will, and dispose of her whole estate, and though, strictly speaking, she made no will, but rather an appointment capable of operating only in equity, the court held that it was for the spiritual jurisdiction to determine to whom to grant administration, and refused to interpose in favour of the husband (x).

So where a feme covert, by virtue of her power to dispose of her estate, devised a term for years to J. S. administration was granted to the devisee (y).

[86] On the other hand, where the return to a *mandamus* to grant administration to a husband stated that, by articles before marriage, it was agreed that the wife should have power to

(t) *Watt v. Watt*. 3 *Ves. jun.* 246, 247.
Vid. also *Com. Dig. Admon. B. 6.* 282.

2 *Bl. Com.* 515. 4 *Co. 51 b. Roll. Abr.*
910. 4 *Burn. Eccl. L.* 264.

(v) *Elliott v. Gurr*. 2 *Phill. Rep.* 16.

(w) 3 *Bac. Abr.* 55. in note. *Com. Dig.*
Admon. B. 6. vid *infr.*

(w) 4 *Burn. Eccl. L.* 232. *Rex v.*
Bettesworth. Stra. 1111.

(x) 11 *Vin. Abr.* 87. *Marshall v. Frank,*
Prec. Chan. 480. *Gilb. Eq. Rep.* 143.
S. C.

make a will, and dispose of a leasehold estate, and pursuant to this power she had made a will, and appointed her mother executrix, who had duly proved the same, it was objected that she might have things in action not covered by the deed, and that the husband was at all events entitled to an administration in respect to them, though equity would control it in respect to the lease; the court allowed the objection, and granted a peremptory *mandamus* (^y).

In case of a limited probate, granted to the executor of a married woman as above mentioned (^z), the husband is entitled to administration of the other part of her property, which is called an administration *cæterorum*.

Secondly, the ordinary is to grant administration of the effects of the husband to the widow or next of kin; but he may grant it to either, or both, at his discretion (^a). If the widow renounce administration, it shall be granted to the children or other next of kin of the intestate, in preference to creditors. [1]

(y) 4 Burn. Ecc. L. 232. *Rex v. Bettesworth.* S. & R. 891.

(z) Vid. supr. 68.

(^a) Vid. 11 Vin. Abr. 92. Anon. Stra. 552. 4 Mass. Rep. 348. 2 Caine's Cases, 143.

[1] The law in the several states is as favourable to the husband and wife, in their rights to administration, as that laid down in the text. In some of the states, it is different, and more favourable to their interests respectively. In Virginia, the wife has the prior right of administration to her deceased husband. In Maryland, the husband is not required to take out letters of administration to his intestate wife; but all her *choses in action* devolve on him, as if he had taken out such letters. But *choses in action*, not reduced by him into possession during his life, devolve to her representative, and administration will be granted accordingly. In Georgia, the real and personal estate of the wife becomes alike the absolute property of the husband upon the marriage: and the wife becomes entitled to a child's share if there be children, or her dower at common law, and a child's part of the personal estate, at her election. If there be no children, she takes one-half of the real and personal estate absolutely.

Upon the death of the husband who survived his wife, and administered upon her estate, his executor (or it seems his administrator) is entitled to be administrator *de bonis non* of the wife, in preference to her next of kin. *Hendrin v. Colgin*, 4 Mun. Rep. 231. It seems, too, that his executor is entitled in preference to his residuary legatee. *Ibid.*

In Maryland, letters of administration have been granted to natural children (being residuary legatees) in preference to the widow. *Govan v. Govane*, 1 Har. & M'Hen. 346.

[87] The ordinary may grant administration *quoad* part to the wife, and as to the other part, to the next of kin; for in such case there can be no ground to complain, as the ordinary is not bound to grant it exclusively to either^(b). But the administration is so much a claim of right, that a *mandamus* will be issued by the court of K. B. in favour of the party entitled to enforce it^(c).

It now becomes necessary to inquire who are such next of kin as shall be thus entitled.

Consanguinity or kindred is defined to be *vinculum personarum ab eodem stipite descendentium*, the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral^(d).

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between J. S. the *propositus* in the table of consanguinity, and his father, grandfather, great-grandfather, and so upwards in the ascending line; or between J. S. and his son, grandson, and great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity constitutes a different degree, reckoning either upwards or downwards. The father of J. S. is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; [88] his great grandsire and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains as well in the civil and canon as in the common law.

Thus this lineal consanguinity falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium*,

^(b) 11 Vin. Abr. 71. 3 Bac. Abr. 55. ^(c) Rex v. Inhabitants of Horsley. 8 Com. Dig. Admon. B. 6. Fawtry v. East. 408.

Fawtry. 1 Salk. 36. Vid. infr. ^(d) 2 Bl. Com. 202.

In Connecticut, it is decided that administration is to be granted to the daughter, in preference to the son of the eldest son of the intestate. *Lee & Wife v. Sedgwick*, 1 Root's Rep. 52.

The person entitled to distribution is entitled to administration also. *Cutchin v. Wilkinson*, 1 Call. Rep. 1.

since lineal relations are such as descend one from the other, and both of course from the same common ancestor (e).

Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor, but differing in this, that they do not descend the one from the other.

Collateral kinsmen are, then, such as lineally spring from one and the same ancestor, who is the *stirps* or root, *stipes* or common stock, from which these relations are branched out. As if J. S. have two sons who have each issue; both of these issues are lineally descended from J. S. as their common ancestor, and they are collateral kinsmen to each other, because they are all descended from one common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

[89] Thus the very being of collateral consanguinity consists in this descent from one and the same common ancestor. A, and his brother are related, because both are derived from one father. A, and his first cousin are related, because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen are derived. And as from one couple of ancestors the whole race of mankind is descended, it necessarily follows that all men are in some degree related to each other (f).

The mode of calculating the degrees in the collateral line is not that of the canonists adopted by the common law in the descent of real estates, but conforms to that of the civilians, and is as follows; to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending (g); or, in other words, to take the sum of the degrees in both lines to the common ancestor (h).

(e) Ibid. 203, 204.

(f) 2 Bl. Com. 204, 205. 504.

(g) Ibid. 207 504. *Mentney v. Petty*.

Pre. in Ch. 593.

(h) Ibid. 12th edit. note. (4).

Thus, for example, the *propositus* and his cousin-german are related in the fourth degree. We ascend first to the father (ⁱ), [90] which is one degree, and from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, which is the fourth degree. So, in reckoning to the son of the nephew, or the brother's grandson, we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree (^k).

Of the kindred, those, we must recollect, are to be preferred, who are the nearest in degree to the intestate; but from among persons of equal degree, in case they apply, the ordinary has the power of making his election (^l).

The court never forces a joint administration; and where the option was between two persons in equal degree of relationship, one of whom had been twice a bankrupt, the court rejected the claim of the latter, and condemned him in costs (^m).

But if there be no material objection on one hand, or reasons of preference on the other, the court, in its discretion, puts the administration into the hands of the person with whom the majority of interests are desirous of entrusting the estate (ⁿ).

Of the next of kin, then, first the children, and, on failure of them, the father of the deceased, or if he be dead, the mother is entitled to administration; the parents indeed, as well as the children, are of the first degree, but the children are allowed the preference (^o); then follow brothers (^p), but *primogeniture* [91] gives no right to a preference (^q); then grand-fathers (^r),

(ⁱ) See the table of consanguinity annexed, in which the degrees of collateral consanguinity are computed as far as the sixth.

(^k) 4 Burn. Eccl. L. 355. Black. Desc. 41, 42.

(^l) 11 Vin. Abr. 114, 115. Com. Dig. Admon. B. 6.

(^m) Bell v. Timiswood, 2 Phill. Rep. 22.

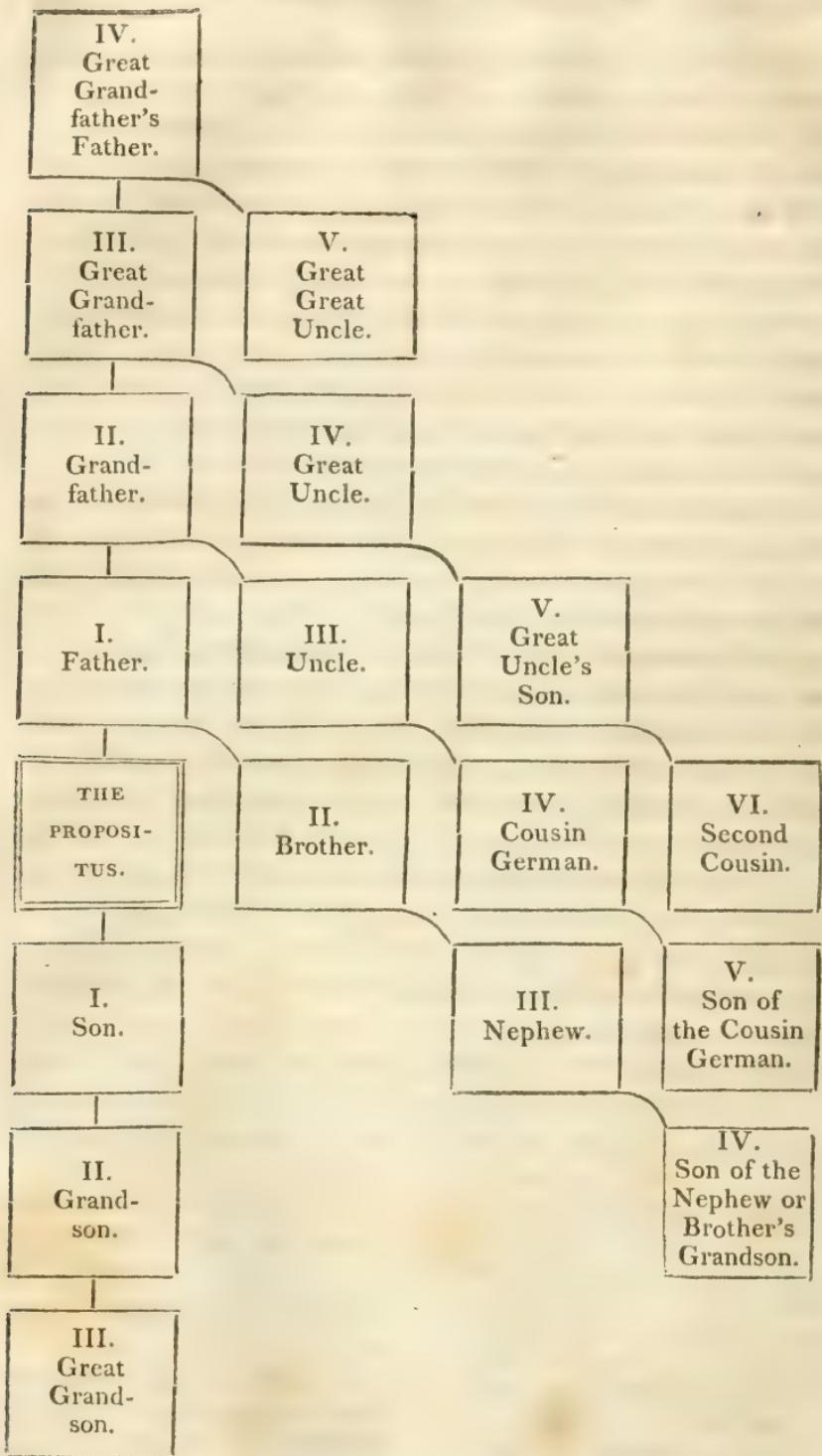
(ⁿ) Budd v. Silver, 2 Phill. Rep. 115.

(^o) 11 Vin. Abr. 91, 92. 2 Bl. Com. 504.

(^p) 11 Vin. Abr. 93.

(^q) Warwick v. Greville, 1 Phill. Rep. 123.

(^r) 11 Vin. Abr. 93. and in note Lord Raym. 684. Com. Dig. Admon. B. 6. Blackborough v. Davis, 1 Salk. 38.



and although they are both of the second degree, yet the former are first entitled; next in order are uncles or nephews (^s), and lastly cousins, and the females of each class respectively (^t). Relations by the father's side and the mother's, in equal degree of kindred, are equally entitled; for in this respect dignity of blood gives no preference (^u). So the half blood is admitted to the administration as well as the whole (^v), for they are the kindred of the intestate, and excluded from inheritances of land only on feudal reasons (^w); therefore the brother of the half blood shall exclude the uncle of the whole blood (^x); and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his discretion (^y). [2]

If a feme covert be entitled, she cannot administer unless with the husband's permission (^z), inasmuch as he is required to enter into the administration bond, which she is incapable of doing. But if it can be shown by affidavit that the husband is abroad, or otherwise incompetent, a stranger may join in such security in his stead. In either case, the administration [92] is committed to her alone, and not to her jointly with her husband (^a); otherwise, if he should survive her, he would be administrator, contrary to the meaning of the act (^b). [3]

(^s) 2 Bl. Com. 505. *Stanley v. Stanley*,

1 Atk. 455.

(^t) 2 Bl. Com. 505.

(^u) *Blackborough v. Davis*, 1 P. Wms. 53.

(^v) 11 Vin. Abr. 91. *Smith v. Tracey*, 1 Ventr. 323. 424. *Earl of Winchelsea v. Norcliffe*, 1 Vern. 437.

(^w) 2 Bl. Com. 505.

(^x) 11 Vin. Abr. 85.

(^y) 2 Bl. Com. 505.

(^z) *Thrustout v. Coppin*, Bl. Rep. 801.

(^a) 11 Vin. Abr. 85. 4 Burn. Eccl. L. 241. Com. Dig. Admon. D. Sty. 75.

(^b) 3 Salk. 21.

[2] In Georgia, "the next of kin shall be investigated by the following rules of consanguinity: that is to say, children shall be nearest; parents, brothers, and sisters, shall be equal in respect to distribution, and cousins shall be next to them." And so with regard to the right to have administration.

[3] In New Hampshire, if an executrix or an administratrix marry, her husband is not entitled to the trust, but her power is extinguished; and the judge of probate may grant administration, if circumstances require it, to the husband, or to such person as would be entitled in case of her death.

If it were committed to them jointly during coverture only, it might perhaps be good, because, if committed to the wife alone, the husband for such period may act in the administration with or without her assent; and therefore the effect of the grant seems in either case the same^(c).

If the wife be the only next of kin, and a minor, she may elect her husband her guardian, to take the administration for her use and benefit during her minority; but the grant ceases on her coming of age, when a new administration may be committed to her.

The stat. 21 H. 8. has also expressly provided for another case than that of actual intestacy; namely, where the deceased has made a will, and appointed an executor, and such executor refuses to take out probate^(b), in such an event the ordinary must grant administration *cum testamento annexo*, with the will annexed, and the duty of such grantees differs but little from [93] that of an executor^(c). He is equally bound to act according to the tenor of the will.

So, if one of two executors prove the will and die, and then the other refuse, such administration shall be granted^(d).

The ordinary cannot grant administration with the will annexed in which an executor is named, until he has either formally renounced his right to the probate, or neglected to appear on being duly cited to accept or refuse the same. So if several executors be named in the will, they must all refuse, or fail to appear on citation previous to the grant. After such administration the executor cannot retract his refusal during the lifetime of the administrator, but he may do so after the grant has ceased by the administrator's death^(e).

A party, although otherwise entitled, may be incapable of the office of administrator on account of some disqualification in point of law. The incapacities of an administrator are not confined to such as have been enumerated in respect of execu-

^(c) 11 Vin. Abr. 85. 4 Burn. Eccl. L. 241. Com. Dig. Admon. D. Wankford v. Wankford, 1 Salk. 305. Vid. Thrustout v. Coppin, Bl. Rep. 801.

^(b) 4 Burn. Eccl. L. 228. 11 Vin. Abr. 78. 2 Inst. 397.

^(c) 2 Bl. Com. 504. 4 Mass. Rep. 634. 3 Munf. Rep. 288.

^(d) Vid. supr. 69.

^(e) Vid. supr. 45.

tors, but comprise attainder of treason, or felony, outlawry, imprisonment, absence beyond sea, bankruptcy (^f), and, in short, [94] almost every species of legal disability; for, by the express requisition of the statute, the ordinary is bound to grant administration to the next and most lawful friends of the intestate (^g).

But coverture is no incapacity, nor is alienage, if qualified, as in the case of executors (^h). Even an alien of the half blood may be appointed an administrator (ⁱ). [4]

(^f) Co. 39 b. Com. Dig. Admon. B. 6. 4 Burn. Eccl. L. 233. 3 Bac. Abr. 56. in note.

(^g) Com. Dig. Admon. B. 6. Fawtry v. Fawtry. 1 Salk. 36.

(^h) Com. Dig. Admon. B. 6. Caroon's Case. Cro. Car. 9. Anon. 1 Brownl. 31.

(ⁱ) 11 Vn. Abr. 94. Crooke v. Watt. 2 Vern. 126.

[4] In Maryland, alienage incapacitates. This state has designated the persons to whom administration shall be granted, with much certainty, and it is presumed with happy effect. Administration is to be granted, at the discretion of the ordinary, to the widow or one of the children: if there are no children, the widow shall be preferred: if there be no widow nor children, the grandchildren shall be preferred; if no grandchild, the father; if no father, the brothers and sisters, and next to them the mother shall be preferred; after her, the next of kin. Males shall be preferred to females of equal degree, and relations of the whole to those of the half blood; but relations of the half blood shall be preferred to those of the whole blood in a remoter degree. Relations descending shall be preferred to relations ascending in the collateral line. None shall be preferred in the ascending line beyond the father and the mother, or in the descending line below a grandchild. A feme sole shall be preferred to a married woman in equal degree. Where a female is entitled, administration may be granted to her and her husband, provided he be capable. Relations on the side of the father shall be preferred to those on the side of the mother, of equal degree. If there be no relations, administration shall be granted to the largest creditor applying for the same. In default of these, administration may be granted at the discretion of the Court.

SECT. II.

Of the analogy of administrations to probates.

WHAT has been stated respecting the different jurisdictions relative to probates, of issuing a commission or requisition in case the party be in an ill state of health, or reside at a distance ; of *bona notabilia* ; of the ecclesiastical privilege of granting probate being personal, and not local^(a) ; of its devolving on the archbishop where the party deceased was a bishop, and on the dean and chapter in case of the death or suspension of the metropolitan or ordinary ; of his being compelled by *mandamus* [95] to grant probate, unless he return a *lis pendens*^(b) ; of caveats and appeals ; of the power of the court of appeal to grant probate where the sentence is reversed^(c) ; of probates being of unquestionable validity in courts of common law^(d) ; of the register's book in the spiritual court being evidence where the probate is lost^(e) ; and, if issue be taken thereon, of its being triable by a jury ; applies equally to letters of administration.

SECT. III.

In regard to the acts of a party entitled previous to the grant.

ALTHOUGH an executor may perform many acts before he proves, yet a party can do nothing as administrator till letters of administration are issued, because the former derives his authority from the will, and not from the probate ; the latter owes his entirely to the appointment of the ordinary^(a).

(^a) 4 Burn. Eccl. L. 241.

(^d) Tourton v. Flower. 3 P. Wms. 369.

(^b) 4 Burn. Eccl. L. 230. Com. Dig. Admon. B. 7. 11 Vin. Abr. 74. 202. 4 Inst. 335.

(^e) 4 Burn. Eccl. L. 248 Peaulie's Case. 1 Lev. 101.

(^c) 11 Vin. Abr. 76. Com. Dig. Admon. B. 2. 2 Roll. Abr. 233.

(^a) 11 Vin. Abr. 202. 4 Burn. Eccl. L. 241. Wankford v. Wankford. Salk. 301.

It has indeed been held that a party before administration may file a bill in chancery, although he cannot commence an action at law (^b).

[96] But by stat. 37 Geo. 3. c. 90. s. 10. if a party administer, and omit to take out letters of administration within six months after the intestate's death, he incurs the penalty of fifty pounds (^c).

SECT. IV.

Practice in regard to administrations.

LETTERS of administration do not issue till after the expiration of fourteen days from the death of the intestate, unless, for special cause, as that the goods would otherwise perish, the judge shall think fit to decree them sooner (^d). [1].

(^b) 4 Burn. Eccl. L. 242. Fell v. Lut-
widge. Barnardist. 320. (^c) Vid. supr. 43. 66.

(^d) 4 Burn. Eccl. L. 242.

[1] In Vermont, Rhode Island, New Hampshire, Massachusetts, and Maryland, the officer of probate is required to issue letters of administration within thirty days. If within that time the widow or next of kin does not claim administration, the judge may cite them, and if they neglect or refuse to administer, he may grant at his discretion. Inventory must be filed within three months. In New York, if application be made for administration by one not entitled as next of kin to the intestate, the surrogate, before granting of administration, shall cite the next of kin by personal service of the citation, if to be found within the state; if not, then by public notice, put up for four weeks in the town where the intestate resided at the time of his death; but if at such time the intestate were not resident in the state, then notice to be given in the public papers for four weeks; and if it appear that the intestate left no relations entitled to his estate, twenty days' notice must be given to the attorney-general before granting of administration. The inventory must be filed within six months. So in New Jersey.

In Pennsylvania, letters of administration are granted at any time after the death of the intestate, unless a *caveat* be entered. But the person applying takes the letters at his peril; for if one having paramount right apply before the expiration of fourteen days from the death of the intestate, the Register will revoke his grant. Inventory must be filed within thirty days.

On taking out letters of administration, the party swears that the deceased made no will, as far as the deponent knows or believes, and that he will truly administer the goods, chattels, and credits, by paying the deceased's debts, as far as the same will extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the spiritual court at the time assigned him by the court, and render a just account of his administration when lawfully required.

[97] And, pursuant to the stat. 21 H. 3. c. 5. and the 22 & 23 Car. 2. c. 10. he enters into a bond, with two or more sureties, conditioned for the making or causing to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the deceased, which have or shall come to the hands, possession, or knowledge of the administrator, or into the hands or possession of any other person or persons for him; and for exhibiting the same into the registry of the spiritual court at or before the end of six months; and for well and truly administering, according to law, such goods and chattels; and further, for the making a true and just account of his administration at or before the end of twelve months; and for delivering and paying all the rest and residue of the goods, chattels, and credits which shall be found remaining on his accounts (the same being first examined and allowed of by the judge of the court), unto such person or persons respectively as the judge by his decree or sentence, pursuant to the statute of distribution, shall limit and appoint; and if it shall thereafter appear that any will was made by the deceased, and the executor therein named exhibit the same into the court, making request to have it allowed and approved accordingly, for the adminis-

In Virginia and Kentucky, if no application be made by the widow or next of kin for letters within thirty days after the death of the decedent, it may be granted by the ordinary at discretion.

In these states, and in the state of Georgia, the inventory is to be rendered whenever required.

In North Carolina, administration may not be granted before the next general Court following the death of the intestate. In this state, and in South Carolina, the inventory must be filed in ninety days.

trator's rendering and delivering, on being thereunto required, (approbation of such testament being first had and made), the letters of administration in the court.

[98] When administration has been once committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant; so different is this case from that of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, “*qui prior est tempore, potior est jure,*” applies in the former, but not in the latter instance (b).

SECT. V.

Of special and limited administrations.

THERE are also various classes of administrations, which, although not founded on the letter of any of the above-mentioned statutes, fall within their spirit and intentment (c). As, if no executor be named in the will, the clause for such appointment being wholly omitted, or where a blank is left for his name, administration shall be granted with the will annexed, when it shall be proved in the same manner as in the case of an executor (d).

Or if the executor die in the lifetime of the testator (e), or if [99] the testator name the executor of B to be his executor, and die in the lifetime of B, for till B's death he is in effect intestate (f).

Or if he name an executor to have authority after a year from his death, for during the year there is no executor (g); and in such cases administration shall be granted in the interval.

So, if the executor be incapable of the office, the party is said to die *quasi intestatus*, and the ordinary must grant administration.

(b) 11 Vin. Abr. 116. Thomas *v.* Butler. 1 Ventr. 218.

(c) 4 Burn. Eccl. L. 237. 11 Vin. Abr. 94. Plowd. 279. Walker, *v.* Woolaston. 2 P. Wms. 582. 589, 590.

(d) 11 Vin. Abr. 69. Com. Dig. Admon. B. 1. 2 Bl. Com. 503, 504. 508.

(e) 11 Vin. Abr. 85. Sty. 147.

(f) Com. Dig. Admon.

(g) Plowd. 279. 281. b.

So, if an executor is afterwards disabled from acting, as if he become lunatic, then, on the same principle of necessity, there shall be a grant of a temporary administration with the will annexed (^b).

So, in all the above-mentioned instances, if there be a residuary legatee, administration is in general granted to him in exclusion of the next of kin, because in that case the next of kin hath no interest in the property, and the presumption of the statute, that the testator would have given it to him, cannot exist where such a legatee is appointed (ⁱ).

If several persons are entitled to the residue, it may be granted to any of them (^k); and if it be thus granted, the other residuary legatees have no claim to a subsequent grant in the lifetime of the grantee.

[100] Such administration may be also granted, although it be uncertain whether there will eventually be a residue or not (^l).

Of this species also is an administration *durante minoritate*, or during the infancy or minority of an executor, or a party entitled to administration (^m).

A distinction exists in the spiritual court between an infant and a minor. The former is so denominated if under seven years of age, the latter from seven to twenty-one. The ordinary *ex officio* assigns a guardian to an infant. The minor himself nominates his guardian, who then is admitted in that character by the judge. According to the practice of the court, the guardianship in either case is granted to the next in kin of the child, unless sufficient objection to him be shown, and administration is committed to such appointee for the use and benefit of the infant or minor.

Although, as we have seen (ⁿ), an administration during the minority of an infant executor was, antecedently to the stat. 38 Geo. 3. c. 87, determined on his attaining the age of seven-

(^b) *Fawtry v. Fawtry*. 1 Salk. 36. cited.

Walker v. Woolaston. 2 P. Wms. 582.

(ⁱ) 11 Vin. Abr. 90. 94. *Govane v. Go-*

vane, 1 Har. & M'Hen. 346.

(^k) Com. Dig. Admon. B. 6. *Taylor v.*

Shore. 2 Jon. 162. 11 Vin. Abr. 94.

(^l) Com. Dig. Admon. B. 6. *Thomson v. Butler*. 2 Lev. 56. 1 Ventr. 219.

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(^m) Com. Dig. Admon. (F.) 11 Vin.

Abr 105.

(ⁿ) Supr. 31.

teen, yet administration during the minority of an infant next of kin was always of force until his age of twenty-one; on the [101] principle that the authority of an administrator is derived from the stat. of 31 Ed. 3. c. 11, which admits only a legal construction, and therefore it was held he must be of the legal age of twenty-one before he is competent; and the executor comes in by the act of the party, and that he should be capable of the executorship at the age of seventeen was in conformity to other provisions of the spiritual law (o). And also, which was the more forcible reason, because the statute of distributions requires administrators to give a bond, which an infant is incapable of doing (p).

But now, by the above-mentioned stat. 38 Geo. 3. c. 87, reciting, that inconveniences arose from granting probate to infants under the age of twenty-one, it is enacted, that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.

If administration be granted to such guardian for the use and benefit of several infants, it ceases on the eldest attaining twenty-one.

If there be several infant executors, he who first attains the [102] age of twenty-one years shall prove the will, and the administration shall cease (q); but administration granted during the minority of several children will not expire on the marriage of one of them to a husband of full age (r). Nor, if an infant be executrix, shall it be determined by her taking a husband who is of age. Nor, if there be several infants, by the death of one of them (s).

If there be two executors, one of whom has attained the age of twenty-one years, and the other not, administration shall

(o) 4 Burn. Eccl. L. 238, 239. Freke v. Thomas. Ld. Raym. 667. Com. Dig. Admon. (F.)

(p) 11 Vinq. Abr. 100, 101. 3 Bac. Abr. 13. Harg. Co. Litt. 89 b. note 6.

(q) 4 Burn. Eccl. L. 218. L. of Test. 473, 474.

(r) Jones v. Earl of Stafford. 3 P. Wms. 79.

(s) Ibid. Sed vide Com. Dig. Admon. (F.) and 5 Co. 29 b.

not be granted during the minority of him that is under age, because the former may execute the will (^c).

According to other authorities (^d), administration shall in such case be granted to the one executor during the minority of the other; but they are not warranted by modern practice.

This administration ought not to be committed to a party who is very poor, or in distressed circumstances, though the guardian or next of kin to the infant. When the court of chancery sees reason to think that such administrator will waste or misapply the effects of the intestate to the prejudice of the infant, for whom he is merely a trustee, that court will appoint [103] a receiver of the personal estate, notwithstanding the grant of administration (^e).

It has been held by some, that if such administrator continues the possession of the goods after the full age of the executor, he becomes an executor *de son tort*; but this is denied by others, and their opinion seems to be more correct, because he came to the possession of the goods lawfully (^w).

In this class is also to be ranked administration *pendente lite*, while the suit is pending (^x); and it may be granted, whether the suit respects a will or the right of administration (^y). But it is never granted till a plea in the cause has been given in, and admitted.

Nor will the court of chancery, generally speaking, in such case interfere, and appoint a receiver during the litigation (^z).

Of the same species also is administration grounded on the incapacity of the next of kin at the time of the intestate's death, arising, for instance, from attaint or excommunication, mad-[104] ness, or bankruptcy. If such incapacity be afterwards removed, such administration may be avoided (^a).

(^c) 4 Burn. Eccl. L. 240. Pigot and Gascoigne's Case. 1 Brownl. 46. 11 Vin. Abr. 99. Foxwist v. Tremaine, 1 Mod. 47. Hatton v. Mascal. 1 Lev. 181.

(^d) 11 Vin. Abr. 97, 98, 99. 3 Bac. Abr. 13. Colborne v. Wright. 2 Lev. 239, 240. S. C. 2 Jo. 119. Smith v. Smith. Yely. 130.

(^v) 11 Vin. Abr. 100. Havers v. Havers. Barnard. 23, 24.

(^w) 11 Vin. Abr. 98. 1 Sid. 57.

(^x) 4 Burn. Eccl. L. 237.

(^y) 3 Bac. Abr. 56. Walker v. Woolaston. 2 P. Wms. 575. 11 Vin. Abr. 105.

(^z) 4 Burn. Eccl. L. 238. Knight v. Duplessis. 1 Ves. 325.

(^a) Com. Dig. Admon. B. 1. Fawtry v. Fawtry. Salk. 36.

To this description also must be referred administration granted at common law *durante absentia*, during the absence of the executor or next of kin from the kingdom; and it of course ceases on the appearance of the executor or next of kin, and his taking out probate or administration (b).

Under this head is also comprised administration granted to a creditor: such administration in general is warranted only by custom, and not by any express law, and may be granted where it is visible the next of kin cannot derive any benefit from the estate; but that is to be understood only where they refuse the grant, and the course is for the ordinary to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or show cause why the same should not be granted to a creditor (c).

And by the aforesaid stat. 33 Geo. 3. c. 87, if, after the expiration of twelve calendar months from the testator's death, the [105] executor to whom probate had been granted shall be residing out of the jurisdiction of his majesty's courts, on application of any creditor, next of kin, or legatee, grounded on an affidavit, in the form therein specified, stating the nature of his demand and absence of the executor, such administration shall be granted. [1]

Of the same nature is administration committed by the ordinary, in default of all the above-mentioned parties, to such discreet person as he shall approve (d).

(b) Roll. Abr. 907. Lutw. 842. Slaughter v. May. Salk. 42. and vid. supr. 70.

(c) 4 Burn. Eccl. L. 230. 2 Bl. Com.

505. Blackborough v. Davis. Salk. 38. Com. Dig. Admon. B. 6.

(d) 2 Bl. Com. 505.

[1] In Vermont, Rhode Island, and Massachusetts, if the executor, and in the two latter states the administrator also, live out of the state at the time of taking upon him the trust, or afterwards remove out of the state, and neglect or refuse, after due notice from the Court of Probate, to render his account and make settlement of the estate, he may be removed, and administration granted at the discretion of the judge. In Connecticut, the provisions of the Act cited in the text are in substance adopted. In Maryland, if the executor be out of the state at the time of the probate, and do not return for six months thereafter, administration may be granted.

The jurisdiction of granting these administrations results from the ordinary's original power at common law, by which he may make the grant to whom he pleases; and therefore it is held, that he may in these cases, as not having been expressly provided for, impose on the grantee such terms as he may think reasonable (e).

Hence, where the executors renounced, and the residuary legatee moved for a *mandamus* to the ecclesiastical judge to be admitted to prove the will, and have administration with the will annexed, on showing cause the court held that the matter was left to the election of the ordinary, and discharged the rule (f).

[106] So, where a grandfather moved for a *mandamus* to such judge to grant him administration of the effects of his deceased son during the minority of his grandson, the court refused the application (g).

On the same principle, where, on the renunciation of the next of kin, several creditors apply for administration, though the court may prefer any one of them (h), yet, on the petition of the others, it will compel him to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own.

There may be also a limited or special administration committed to the party's care, namely of certain specific effects, as of a term for years and the like, and the rest may be committed to others, or for effects of the intestate in this country or place to one, and for effects in that country or place to another; and as well in general cases, as in the case above stated, of the wife, and next of kin (i). But several administrations cannot be granted in respect of one and the same thing; as a house, or a bond,

(e) 4 Burn. Eccl. L. 237. 3 Bac. Abr. 13. Ld. Grandison v. Countess of Dover. Skin. 155. Walker v. Woollaston. 2 P. Wms. 582. 589, 590. Briers v. Goddard. Hob. 250. Thomas v. Butler. 1 Ventr. 219. Smith's Case. Stra. 892. Rex v. Betteworth. ib. 956.

(f) 4 Burn. Eccl. L. 231. Rex v. Bet-

tesworth. Stra. 956. Com. Dig. Admon. B. 6.

(g) 4 Burn. Eccl. L. 231. Smith's Case. Stra. 892.

(h) Harrison v. All Persons. 2 Phill. Rep. 249.

(i) Com. Dig. Admon. B. 7. Roll. Abr. 908. Vid. supr. 87.

or any other debt. For it would be absurd that two persons should have a distinct right to an individual chattel, or *chose in action* (^k). In respect however to creditors, such several administrators [107] are all considered as one person, and may be sued accordingly (^k).

Administration also may be granted on condition, as where a former grantee is outlawed, and in prison beyond sea, it may be committed to another, but so as, if the first grantee shall return, he shall be entitled to administer (^l).

The ordinary also, in default of persons entitled to the administration, may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, and thus assume the office of an executor or administrator in respect to the collecting of them ; but the grantee of such letters cannot sell the effects without making himself an executor *de son tort*. The ordinary has no such authority, and therefore he cannot confer it on another (^m).

If a bastard, who, as *nullius filius*, hath no kindred, or any other person having no kindred, die intestate, and without wife or child, it hath formerly been holden that the ordinary could seize his goods, and dispose of them to pious uses ; but now it seems settled that the king is entitled to them as *ultimus hæres* ; yet in such case it is the practice to transfer the royal claim by [108] letters patent, or other authority from the crown, with a reversion, as it is said, of a tenth, or other small proportion of the property, and then the ordinary of course grants to such appointee the administration (ⁿ). [2]

(^k) 3 Bac. Abr. 57. Roll. Abr. 908. Fawtry *v.* Fawtry. Salk. 36. Vid. supr. 98.

(^k) 11 Vin. Abr. 139. Rose *v.* Bartlett. Cro. Car. 293.

(^l) Com. Dig. Admon. B. 7. Roll. Abr. 908. 11 Vin. Abr. 70.

(^m) 4 Burn. Eccl. L. 241. 11 Vin. Abr. 87. Off. Ex. 174, 175. 2 Bl. Com. 505.

(ⁿ) Com. Dig. Admon. A. 11 Vin. Abr. 88. Jones *v.* Goodchild, 3 P. Wms. 33. 1 Wooddes. 398. Dougl. 548.

[2] Where a naturalized citizen dies intestate, the Court will order the remainder of his estate to be paid to the treasurer of the commonwealth, for its use, until some person shall be entitled to receive the same as next of kin or otherwise. *Dorr, Adm. v. Commonwealth*, 1 Mass. T. R. 293.

It has indeed been asserted that such letters patent are merely in the nature of a recommendation; and that though it be usual for the ordinary to admit such patentee, yet it is rather out of respect to the king than strictly of right^(o).

Administration may also be granted to the attorney of all executors, or of all the next of kin, provided they reside out of the province: but if the effects are under twenty pounds, such administration may be granted, whether they are so resident or not.

A grant of administration in a foreign court, as for example at Paris, is not taken notice of in our courts of justice^(p). [3]

[109] SECT. VI.

Of administrations to intestate seamen and marines.

WITH regard to the administration of the wages, pay, prize-money, bounty-money, or allowance of money of such petty officers, and seamen, non-commissioned officers of marines, and marines, as are above-mentioned, in respect of services in his majesty's navy, by the before-cited stat. 55 Geo. 3. c. 60. it is enacted, that the party claiming such administration shall send or give in a note or letter to the inspector of seamen's wills, stating his place of abode, and the parish in which the same is situate, the name of the deceased, the name of the ship or ships to which he belonged, and that he has been informed of his death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased; upon receipt whereof the inspector shall send, or cause to be sent, by course of post, under cover to the minister, officiating minister or curate of the parish wherein the claimant shall

(o) 11 Vin. Abr. 86. Manning v. Napp.
1 Salk. 57.

(p) Tourton v. Flower. 3 P. Wms. 371.
Vid. supr. 72.

reside, a petition or paper containing a list of the degrees of kindred to the tenth degree inclusive, with blanks for the time and place of the intestate's birth, and the ship he belonged to, and that the party had obtained information of his death, with blanks for the place where, and the time when it happened, without leaving a will, to the best of the party's knowledge and belief, and applying to the inspector for a certificate, to enable such party to obtain letters of administration to the deceased's effects, with also a blank of his degree of kindred ; and stating [110] that no one, to the best of his knowledge and belief, was of a nearer degree at the time of the intestate's death, who died (with a blank in which to insert whether) bachelor or widower ; to which form shall be subjoined a blank certificate, to be signed by two reputable housekeepers of the parish where the party applying is resident, of their knowledge of him, and of their belief that what he states is true ; and also another certificate, to be signed by the minister of the parish, and two of the churchwardens or two elders of the same, as the case may be, certifying that such two housekeepers are resident in the parish, and of good repute, and also stating, that if the party applying is the widow of the deceased, she must forward with such certificate an extract from the parish register, or some other authentic proof of her marriage, and containing also the same directions as annexed to the second certificate subjoined to the above-mentioned check (^a), in regard to proof of the deceased's death, if he died after he had left the naval service, in regard to mentioning the name of a proctor to be employed in obtaining the administration : and that the application, when filled up and attested, shall be sent by the general post under cover, directed to the treasurer or paymaster of his majesty's navy, London. And the inspector shall at the same time send or cause to be sent to such minister, officiating minister, or curate, a letter, acquainting him with the nature of the claim and the steps to be taken thereon ; and also send or cause to be sent, in like manner, to the claimant, a letter, advising him of the forwarding of the petition or paper, under cover, to such minister, officiating minister or curate, and directing him to take such

(^a) Supr. 62.

steps as are directed, for the purpose of substantiating his claim to the satisfaction of the inspector; and upon receipt of the said petition or paper and letter, the minister, officiating minister or curate, shall, on being applied to for his signature to the paper, examine the claimant, and also two inhabitant householders of the parish as may be disposed to sign the first certificate on the paper, touching the right of such claimant to the administration to the effects of the intestate, according to the degree of relationship stated in such petition, and being satisfied of such right, the person claiming such administration shall fill up, or cause to be filled up, the several blanks in the first part of the paper, according as the truth may be, and subscribe the same in the presence of the minister, officiating minister or curate, and the two inhabitant householders shall also subscribe the first certificate on the paper (the blanks therein being first filled up agreeably to the truth) in the like presence; for which purposes the claimant and the householders shall attend at such time and place, as the minister, officiating minister, or curate shall appoint; and the minister, officiating minister or curate shall sign the second certificate upon the paper (the blanks therein, and in the description thereunto subjoined, being first filled up agreeably to the truth); and the claimant shall, before his examination, or his signing the petition or application, pay to the minister, officiating minister or curate, a fee of two shillings and sixpence for his trouble on the occasion; and the said paper being in all things completed according to the directions therein and hereby given, the same shall be returned by the minister, officiating minister or curate, by [111] the general post, addressed to the treasurer or paymaster of his majesty's navy, London; and he, on receiving the same, shall direct the inspector to examine it, and make such inquiry relative thereto as may appear to him necessary; and, if he shall be satisfied, to make out a certificate, stating the application of the party to his office, containing the party's description, and stating whether he is sole or one of the next of kin of the deceased, the original place of residence of the deceased, and whether seaman or marine, and the name of the ship he belonged to, and that he died intestate, and whether bachelor or widower, together with the time of his death; and that it ap-

pearing that no will of the deceased has been lodged in the office, he therefore grants such abstract of the application, and certifies that he believes what is stated to be true; and that such party may obtain letters of administration to the effects of the deceased, which appear not to exceed a sum specified, provided such party is otherwise entitled thereto by law: to which certificate there shall be subjoined a notice, that the previous commission or requisition is to be addressed agreeably to the superscription of the within cover, in which the same is to be [112] enclosed and forwarded by the proctor; and when the commission or requisition shall be returned to the office, it will be forwarded to him, and he is then to sue out letters of administration, and send them to the inspector, with his charges noted thereon; and then this certificate the inspector shall sign, and address to a proctor in Doctors' Commons, and shall at the same time enclose therein a letter addressed to the ministers and churchwardens, or elders (as the case may be), of the parish within which the party then resides, franked by the treasurer, paymaster, or inspector, in which the previous commission or requisition is to be enclosed, informing him of the application attested by him and the two churchwardens or elders, and requiring him to swear the party accordingly, provided he answers the description contained in such commission or requisition; and when the same is executed, to return it to the treasurer or paymaster of his majesty's navy, London, and to specify and describe the receiver-general of the land-tax, collector of the customs or of the excise, or the clerk of the check, whose abode is nearest to the party applying, when such person will be directed to pay him the wages due to the deceased; and the proctor shall, immediately on receipt of such certificate enclosed in such letter, sue out the previous commission or requisition, and enclose it, with instructions for executing the same, in such letter, and shall transmit the letter by the general post [113] to the minister, agreeably to the address put thereon, by the treasurer or paymaster of the navy, or the inspector.

If the minister, officiating minister or curate, shall reject the petition or paper, for want of proof to his satisfaction of the claimant being the person entitled to letters of administration of the deceased's effects, such minister, officiating minister or

curate, shall state his reasons for such rejection on the petition or paper, and return the same, addressed to the treasurer or to the paymaster of the navy; and in case no application shall be made to the minister, officiating minister or curate, by the claimant, or no effectual steps shall be taken by such claimant, so as to complete the petition or paper, and the certificates thereon, within the space of two calendar months from the date of the inspector's letter accompanying such petition or paper, the minister, officiating minister or curate, shall at the expiration of that time return the petition or paper, addressed to the treasurer or to the paymaster of the navy, with his reason for doing so noted thereon.

The minister shall, immediately upon the receipt of such letter, with the previous commission or requisition or other instrument enclosed therein, take such steps as to him may seem proper or necessary for procuring the execution of such previous commission or requisition, or other instrument transmitted by the proctor to be executed; and being executed, he shall transmit the same to the treasurer or to the paymaster of his majesty's navy, London; who shall, immediately upon the receipt thereof, send the previous commission or requisition, or other legal instrument executed by the person applying for the administration, to the proctor employed in Doctors' Commons, who shall forthwith sue out and procure letters of administration in favour of the person so applying for the same, in the manner and form above-mentioned, to the estate and effects of the intestate.

As soon as any letters of administration, or probates of wills, or letters of administration with will annexed, have been obtained, and passed the seal of the proper court in the manner directed, the proctor who sued them out shall immediately send the same, addressed to the treasurer or to the paymaster of his majesty's navy, together with a copy of the will, and an account of his charges and expenses in obtaining the same; which shall not exceed the sum or sums hereinafter specified; and the treasurer or paymaster of his majesty's navy, upon receiving such letters of administration, or probates of wills, or letters of administration with will annexed, shall direct the inspector of seamen's wills to issue a check containing the heads

thereof ; and the inspector shall note thereon the amount of the proctors' charges and expenses, provided the same shall be at and after the rates allowed to be charged ; and likewise specify and describe upon the said check, the revenue officer or clerk of the cheque residing nearest to the administrator or executor so to be named in such check, if such communication shall have been made to him ; which check, so prepared, shall be delivered over by him to the administrator or executor, together with the copy of the will transmitted to him by the proctor, the copy being first stamped by the inspector, if the administrator, or the administrator with will annexed, or the executor, shall be present or demand the same in person ; but if he shall not be present, but be and reside at a distance, then the inspector shall deliver such check and such copy of will to the deputy-paymaster.

No proctor shall deliver any letters of administration, probate of will, or letters of administration with will annexed, to any person but the treasurer or paymaster of the navy, or the inspector of seamen's wills, under a penalty of one hundred pounds.

For further penalties upon a proctor acting contrary to the provisions of the act, vid. supr. 64.

The statute also prescribes similar regulations in regard to the grant of administration to a creditor of such intestate.

[114] SECT. VII.

Of administrations in case of the death of the administrator, or of the executor intestate.

I AM now to consider the effect of the death of an executor or administrator with regard to the administration.

Where administration is granted to two, and one dies, the survivor shall be sole administrator (^a) ; for it is not like a letter of attorney to two, where by the death of one the authority

(^a) 4 Burn. Eccl. L. 241. Hudson v. Hudson, Ca. Temp. Talb. 127.

ceases, but it is an office analogous to that of an executor, which survives (b).

An administrator is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust; and therefore, on the death of that officer, it results to the ordinary to appoint another. And if A's executor die intestate, the administrator of such executor has clearly no privity or relation to A, since he is commissioned to administer the effects only of the intestate executor, and not of the [115] original testator. In both these cases, therefore, it is necessary for the ordinary to commit another administration (c).

But, with regard to the species of administration to be thus granted, a distinction arises between the case where the executor or next of kin had before his death taken out probate or letters of administration, and where he had omitted to do so.

If an executor die before probate, his executor cannot prove or take on himself the execution of the will of the original testator, because he is not thereby named executor to such testator. He only can prove the will who by the will is constituted executor. The omission of the first executor to prove the same on his death determines, although it does not avoid the executorship, or vacate the acts which he has performed in such character (d).

When this case occurs, an administration must be granted, and the grantee shall be the representative of the party who originally died; but it shall be an immediate administration, that is, without making mention of the executor, whether he did in point of fact administer, or not; because administering [116] is an act in *pais*, of which the spiritual court cannot take notice. The ordinary must commit administration, as it appears to him judicially; and it can thus appear only by the probate (e).

In like manner, if A die intestate, and B be entitled to ad-

(b) 3 Bac. Abr. 56. Adams *v.* Buckland, 2 Vern. 514. 11 Vin. Abr. 69. Com. Dig. Admon. B. 7.

(c) Com. Dig. Admon. B. 6. 4 Burn. Eccl. L. 241. 1 Roll. Abr. 907. 2 Bl. Com. 506.

(d) 11 Vin. Abr. 67. 90. 111. Wankford

v. Wankford, 1 Salk. 308, 309. Hayton *v.* Wolfe, Cro. Jac. 614. pl. 4. Shep. Touch. 464. Isted *v.* Stanley, Dyer, 572. Comber's Case, 1 P. Wms. 767.

(e) Wankford *v.* Wankford, 1 Salk. 308. 3 Bac. Abr. 19.

minister, and die before he take out administration, an immediate administration shall be committed: in such case it shall be granted to the representatives of **B**, if the only party in distribution, in preference to the representatives of **A**, because by the statute of distributions **B** had a vested interest, and in such grant the ecclesiastical court regards the property; and therefore if a son die intestate without wife or child, leaving a father, and the father shall himself die before he takes out administration, it shall be committed to his representatives (^f); and so it has been held, in case the wife die intestate, and the husband die before he takes out administration, it shall be granted to the representatives of the husband; but it is now settled that the court is in the latter instance bound by stat. 31 E. 3. to grant administration to the next of kin of the wife, and then he shall be a trustee in equity for the husband's representatives (^g).

If the deceased executor hath taken out probate, or the de- [117] ceased's next of kin administration, then another species of administration, which hath not hitherto been mentioned, becomes necessary, namely, an administration *de bonis non*, that is, of the goods of the deceased left unadministered by the former executor or administrator, by the grant of which, such administrator *de bonis non* becomes the only personal representative of the party originally deceased (^h). [1]

Administration of either species is, generally speaking, granted to the next of kin of such party. But in case there be a

(^f) 11 Vin. Abr. 88. pl. 25. *Squib v. Wyn*, 1 P. Wms. 381. Vid. also Com.

Dig. Admon. B. 6. Vid. *Earl of Win-*
chelsea v. Norcliffe, 1 Vern. 403.

(^g) *Elliott v. Collier*, 3 Atk. 526. S. C.
1 Ves. 16. and 1 Wils. 169. 4 Burn.

Eccl. L. 235. 11 Vin. Abr. 88. pl. 27.

Squib v. Wyn, 1 P. Wms. 382. note 1.
Vid. infr. 217.

(^h) 11 Vin. Abr. 111. *Attorney-General v. Hooker*, 2 P. Wms. 340. Com.

Dig. Admon. B. 1. *Plowd.* 279. 3 Bac.
Abr. 19. *Farewell v. Jacobs*, 4 Mass.
T. R. 634.

[1] And this administration is to be granted, where the estate is not fully settled, if the administrator be dead or have absconded. *Brattle v. Gustin*, 1 Root's Rep. 425; even though the estate have been distributed, if there remain debts unsatisfied. *Brattle v. Converse*, Ib. 174.

residuary legatee, it shall be granted to him in preference to such next of kin on the principle above stated, because the next of kin has then no interest in the property (¹). Thus, where A made C executor and residuary legatee, and B made C executor without giving him the surplus, and C afterwards died intestate, it was held that the administrator of C should be administrator *de bonis non* of A, but that the next of kin of B should be administrator *de bonis non* of B (²). If the residue be bequeathed to several persons, such administration may be granted to all or either of them, as in the case of an original administrator, although there be no present residue (³). But for such purpose there must be a complete disposition of the property (⁴). If the executor be himself residuary legatee, although he refused, or, before he proved the will, died *intestate*, an immediate administration with the will annexed shall be granted to his administrator (⁵). If an executor be residuary legatee, although he refused, or died *before probate*, leaving a will, his executor will be entitled to such administration (⁶). If an executor and residuary legatee, *after probate*, die intestate, administration *de bonis non*, with the will annexed of the testator, shall be granted to the administrator of such executor. If a feme covert executrix die intestate, then, as to the effects which she had in that capacity, administration shall be granted to the residuary legatee if any, or to the next of kin of the testator. If she were herself residuary legatee, it shall be granted to her husband (⁷).

Where there are two executors, of whom only one proves and dies, and then the other renounces, the executors of the acting executor have no concern with the administration of the

(¹) Com. Dig. Admon. B. 6. Thomas *v.* Butler, 1 Ventr. 219. S. C. 2 Lev. 56. 3 Bac. Abr. 19.

(²) 11 Vin. Abr. 87. Farrington *v.* Knightly, Prec. Chan. 567.

(³) Com. Dig. Admon. B. 6. Vid. Thomas *v.* Butler, 2 Lev. 56.

(⁴) 11 Vin. Abr. 89. Jo. 225.

(⁵) 11 Vin. Abr. 88. 92. 2 Roll. Rep. 158.

(⁶) Com. Dig. Admon. B. 6. Isted *v.* Stanley, Dy. 372.

(⁷) 11 Vin. Abr. 89. 91. 111. Rachfield *v.* Careless, 2 P. Wms. 161. 4 Burn. Eccl. L. 236. 3 Salk. 21. 11 Vin. Abr. 90, 91. 95. 108. Vanthieuson *v.* Vanthieuson, Fitzgibb. 203. Johnson's Case, Poph. 106.

goods unadministered, but the same shall be granted to the next of kin, or residuary legatee of the first testator (^a).

[119] So, if there be two executors, one of whom appoints an executor, and dies, and the survivor dies intestate, the executor of the executor shall not intermeddle with the first testator's effects; for the power of his testator was determined by his death, and the executorship vested solely in the other executor as survivor.

So, where an administrator is appointed during the minority of the executor of an executor, he has no authority to intermeddle with the effects of the original testator. The ordinary, in either case, shall commit administration *de bonis non* to the next of kin or residuary legatee of the original testator (^r).



SECT. VIII.

How administration shall be granted—when void—when voidable—of repealing the same—how a repeal affects mesne acts.

ADMINISTRATION is generally granted by writing under seal; it may also be committed by entry in the registry, without letters *sub sigillo*; but it cannot be granted by parol (^a).

[120] In letters of administration, the style of jurisdiction, as well as the name of the ordinary, shall be inserted (^b).

A party may refuse the office, nor can the ordinary compel him to accept it (^c).

Where administration is improperly granted, a distinction occurs between administrations which are void, and such as are only voidable.

If there be an executor, and administration be granted before probate and refusal, it shall be void on the will's being after-

(^a) Com. Dig. Admon. B. 1. House v. Lord Petre, Salk. 311.

(^r) 11 Vin. Abr. 67. in note 89. Off. Ex. 101 Limmer v. Every, Cro. Eliz. 211. 3 Bac. Abr. 13.

(^a) 11 Vin. Abr. 70. Anon. 1 Show, 408, 409. Godolph. 231. Com. Dig. Admon.

B. 7.

(^b) 4 Burn. Eccl. L. 273. (^c) Id. 233.

wards proved, although the will were suppressed, or its existence were unknown^(d), or it were dubious who was executor^(e), or he were concealed or abroad^(f) at the time of granting the administration. Or, if there be two executors, one of whom proves the will, and the other refuses, and he who proved the will dies, and administration is granted before the refusal of the survivor, subsequently to the death of his co-executor; or if granted before the refusal of the executor, although he afterwards refuse^(g), such administration shall be void. It shall also be void if granted on the ground of the executor's becoming [121] a bankrupt, as it was before the stat. 38 Geo. 3. c. 87, if committed *durante minoritate*, where the infant executor had attained the age of seventeen^(h). It shall also be void if granted by an incompetent authority, as by a bishop, where the intestate had *bona notabilia*⁽ⁱ⁾, or by an archbishop, of effects in another province^(k). [1]

In all these instances, the administration is a mere nullity. The executor's interest the ordinary is incapable of divesting. But there is another description of cases, where administration is not void, but voidable only by the act of the spiritual court, as if administration be granted to a party not next of kin^(l), or to one of kin together with one not of kin, as to a sister and her husband^(m), or to the wife's next of kin instead of the hus-

(d) Com. Dig. Admon. B. 1. Plowd. 279. 282.

(e) Com. Dig. Admon. B. 1. Robin's Case, Moore, 636.

(f) 11 Vin. Abr. 68. Abram v. Cunningham, 2 Lev. 182.

(g) Com. Dig. Admon. B. 2. B. 10. Abram v. Cunningham, 2 Lev. 182. Vid. Anon. 1 Show. 411.

(h) 11 Vin. Abr. 99. 5 Co. 29 b. 8 Cranch, 9. 21.

(i) 3 Bac. Abr. 36. Com. Dig. Admon. B. 3. Blackborough v. Davis, 1 Salk. 39. 1 P. Wms. 44. 767. S. C.

(k) Allison v. Dickenson, Hard. 216.

(l) Com. Dig. Admon. B. 6. Blackborough v. Davis, Salk. 38. 1 P. Wms. 43. S. C.

(m) Com. Dig. Admon. B. 8. A1. 36.

[1] Administration is void, if committed to any one without bond and sureties. In Pennsylvania, the officer of probate is liable for all damages arising from the want of such bond. In Maryland, he is liable for the sufficiency of the sureties in bonds. Administration originally granted upon the estate of a deceased person, after the expiration of twenty years from the death of such person, is *ipso facto* void. *Wales, Adm. v. Willard*, 2 Mass. Rep. 120.

band (n); or if it be granted on the refusal of an executor who had before administered (o); or if it be granted, *non vocatis jure vocandis*, without citing the necessary parties (p); or to a stranger (q); or by fraud and misrepresentation, though otherwise duly granted (r), as where the grantee by false suggestions prevented a party in equal degree from applying; or in case [122] administration be granted in consequence of the incapacity of the next of kin, and the incapacity be removed (s); or if the grantee shall become *non compos mentis*, or otherwise incapable (t); or if it be granted to a creditor before the renunciation of the next of kin (u); it is not void, but voidable, and may be repealed.

If there be a residuary legatee, and administration be granted to the next of kin, though not void, it may also be repealed, whether there be any present residue or not (w).

Although a feme covert die entitled to several debts due to her before marriage, which by law do not belong to the husband, and her next of kin appear, and take out administration, it shall be repealed, and administration granted to the husband (x).

If there be two grants of administration, one by the metropolitan, and the other by the bishop, where they were not *bona notabilia*, the prerogative administration may be repealed (y).

At common law the ordinary might repeal an administration at his pleasure; but now, since the stat. 21 H. 8, if administration [123] be regularly granted to the next of kin, according to the provisions of the same, the ordinary has no such discretion. If he assign a cause for a repeal, the temporal courts are to judge

(n) 11 Vin. Abr. 85. Anon. 1 Sid. 409.

(o) Com. Dig. Admon. B. 8. Off. Ex. 40, 41.

(p) 11 Vin. Abr. 115. Com. Dig. Admon. B. 8. Ravenscroft *v.* Ravenscroft, 1 Lev. 305.

(q) 11 Vin. Abr. 95. Wilson *v.* Pate-man, Moore, 396.

(r) 11 Vin. Abr. 114. 117. Harrison *v.* Mitchell, Fitzgibb. 303.

(s) 11 Vin. Abr. 115. Offley *v.* Best, 1 Sid. 373.

(t) 11 Vin. Abr. 115, 116.

(u) Com. Dig. Admon. B. 6. Blackborough *v.* Davis, 1 Salk. 38. 4 Burn. Eccl. L. 249. Harrison *v.* Weldon. Stra. 911.

(w) Com. Dig. Admon. B. 8. Thomson *v.* Butler, 2 Lev. 56. 1 Ventr. 219. S. C. (x) 11 Vin. Abr. 92. in note 116. Du-bois *v.* Trant, 12 Mod. 438.

(y) 11 Vin. Abr. 114. Allens *v.* Andrews, Cro. Eliz. 283. Com. Dig. Admon. B. 8.

of its sufficiency^(a). Thus it was held, that where the ordinary had elected to grant administration to the father, he had no power of repealing the administration at the suit of a party alleging herself to be the widow^(a). [2]

So where administration was granted to a sister, a married woman, pending a caveat entered by the brother, on appeal it was adjudged that the administration should not be revoked at his suit^(b).

And where administration was granted to the younger brother, and the elder sued to repeal it, the decision was the same; but in that case it was intimated it would have been different if the administration had been granted pending a caveat^(c). Nor, if administration be granted to a creditor, and afterwards a creditor to a larger amount appear, shall it be revoked for him^(d). So where administration during the infancy of the [124] intestate's sister was committed to the great-grandmother, and though the grandfather, the plaintiff in prohibition, suggested that the administration was granted by surprise, and that, as he was nearer of kin, it ought to be granted to him; the court thought, in this instance, propinquity to be no ground of preference, and, since the ordinary had no power at common law to grant such administration in the case of an infant next of kin, but only in that of an infant executor, having once

(^a) 11 Vin. Abr. 114. 4 Burn Eccl L. 248, 249. Com. Dig. Admon. B. 8.

Blackborough *v.* Davis, 1 P. Wms. 42. sed vid. Skinner, 156.

(^a) Sand's Case, Raym. 93. S. C. 3 Salk. 22. 11 Vin. Abr. 115. S. C. 1 Kebl. 667. 683. S. C. 1 Sid. 179.

(^b) 11 Vin. Abr. 115. Offley *v.* Best, 1 Lev. 186.

(^c) 11 Vin. Abr. 116. Ayliffe *v.* Ayliffe, 2 Kebl. 812. Harrison *v.* Mitchell,

Fitzgib. 303.

(^d) 11 Vin. Abr. 116. Dubois *v.* Trant, 12 Mod. 438.

[2] In Pennsylvania, the Register's Court has a right to revoke letters of administration where they have issued improperly, and to direct to whom new letters shall issue. But the power of an administrator to recover debts due to his intestate continues in force, notwithstanding a decree of the Register's Court revoking the letters of administration, if there has been an appeal to the Supreme Court from such decree, until the determination of the appeal. *Shauffer v. Stoever*, 4 Serg. & R. 202.

executed his authority, the grant ought not to be repealed (^e). So where A, an infant, was made executor and residuary legatee, and if he died under age, then B, another infant, was appointed residuary legatee, and on the like contingency, the residue was bequeathed to C; administration during the minority of A was granted to M, his mother; A died intestate under age, B was still an infant; and on the question whether the administration might be repealed and granted to C, the court seemed to be of opinion that the ordinary had executed his authority, and that M should not be divested of the administration during the infancy of B (^f).

So also administration *de bonis non*, with the will annexed, granted to one, where two had equal right, is good, and shall not be revoked (^g).

[125] But, in general, if administration be granted to a wrong party, in such case the ordinary may repeal it, and grant it to another, for he has not executed his authority, and it is a power incident to every court to rectify its errors (^h).

Therefore, where a feme covert has died intestate, and her next of kin had obtained administration, it was adjudged that it should be repealed at the suit of the husband, because the ordinary had no power or election to grant it to any other than to him (ⁱ).

A person in possession of an administration, is not bound to propound his interest till the party calling in question the grant has first propounded and proved his (^k).

If the administration be repealed for want of form in the grant, in such case the ordinary must regrant it to the same party, although there be others in equal degree (^l).

(^e) 11 Vin. Abr. 100. 116. Ld. Grandison *v.* Countess of Dover, 3 Mod. 23. 25. Ld. Grandison *v.* Countess of Devon, Skin. 155. Vid. Sadler *v.* Daniel, 10 Mod. 21.

(^f) 11 Vin. Abr. 116. Dubois *v.* Trant. 12 Mod. 436. 438.

(^g) 11 Vin. Abr. 116. Taylor *v.* Shore, 2 Jo. 161.

(^h) 11 Vin. Abr. 114. 4 Burn. Eccl. L. 248, 249. Com. Dig. Admon. B. 8. Blackburn *v.* Davis, 1 P. Wms. 42. sed vid. Skinner, 156.

(ⁱ) 11 Vin. Abr. 116. 4 Burn. Eccl. L. 248. Sand's Case, 3 Salk. 22.

(^k) Dabbs *v.* Chisman, 1 Phill. Rep. 155. Hibben *v.* Caleberg, ib. 166.

(^l) 11 Vin. Abr. 115. Offley *v.* Best, 1 Sid. 293.

If administration be repealed *quia improvide*, that is, where, on a false suggestion in respect to the time of the intestate's death, it issued before the expiration of a fortnight from that event; or where the court on committing it took security inadequate to the value of the property, it shall be granted to the same person⁽ⁿ⁾.

Nor can the ordinary revoke the grant on account of abuse, [126] although the letters were issued after a caveat entered, for he ought to take sufficient caution in the first instance to prevent mal-administration^(o). Nor can he revoke it on the administrator's omission to bring in an inventory and account^(p).

If the grant regularly issue, and subsequent letters of administration be obtained by collusion, such subsequent letters are void, and shall not repeal the former administration^(q).

Some authorities maintain, that if the ordinary commit administration to the wrong party, and then commit it to the right, the second grant is a repeal of the first without any sentence of revocation^(r); but in other cases it is held, that the first is not avoided except by judicial sentence^(s). And the practice is, to call in and revoke the first administration before the second is granted. But after an administration by an archbishop, if the bishop to whom it belongs grant administration, and then the first administration be repealed, the administration granted by the bishop before the repeal shall stand good^(t).

So, in all cases where the first administration is repealed, the [127] second shall be valid, though committed after the grant of the first, and before the repeal of it^(t).

If the ecclesiastical courts, in the granting or repealing of administrations, shall transgress the bounds which the law prescribes to them, a prohibition from the temporal courts shall

(n) Com. Dig. Admon. B. 3. Offley v. Best, 1 Sid. 293.

(q) 11 Vin. Abr. 114. 4 Burn. Eccl. L. 249.

(o) 11 Vin. Abr. 115. Com. Dig. Admon. B. 8. Thomas v. Butler, 1 Ventr. 219.

(r) 11 Vin. Abr. 115. in note. Pratt v. Stocke, Cro. Eliz. 315.

(p) 11 Vin. Abr. 116. Sty. 102.

(s) Com. Dig. Admon. B. 3. 8 Co. 135 b.

(r) 11 Vin. Abr. 114. 3 Co. 78 b.

(t) Com. Dig. Admon. B. 3. Vid. 2 Brownl. 119.

be awarded, as in the case above-mentioned, where the ordinary has granted a regular administration, and is proceeding to repeal it on insufficient grounds, such as mal-administration (^u), or that the letters issued after a caveat entered (^v): but no prohibition to the ecclesiastical courts shall issue on suggestion, that they are about to repeal an administration granted by surprise, or that they refused to commit the administration to the intestate's next of kin, but were proceeding to grant it to another, for the point, who is in fact next of kin, is of spiritual cognisance, and must be contested before the spiritual jurisdiction (^w).

How far the repeal of an administration affects the intermediate acts of the former administrator remains now to be considered.

And here we must again recur to the distinction between [128] such administrations as are void, and such as are only voidable. If the grant be of the former description, the mesne acts of such administrator shall be of no validity; as, if administration be committed on the concealment of a will, and afterwards a will appear; inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void (^x). Or if administration be granted before the refusal of the executor, a sale by the administrator of the testator's effects shall be void, although the executor afterwards appear and renounce (^y). Or if the executor omit proving the will, whereby administration is granted to a debtor, the executor may afterwards prove it, and then sue the administrator for the debt, which is not extinguished by the administration (^z). So where an administratrix sued a debtor of the intestate, and, pending the suit, another by fraud procured a second administration to himself jointly with her, and

(^u) Thomas *v.* Butler, 1 Ventr. 219. Al 56

(^v) Offley *v.* Best, 1 Lev. 186. Dub. S. C. 1 Sid. 371. 1 Lev. 187. & vid. supr.

(^w) Blackborough *v.* Davis, 1 P. Wms. 43. 2 Bl. Com. 112. 11 Vin. Abr. 92. 115. Com. Dig. Admon. B. 7, 8.

(^x) Com. Dig. Admon. B. 10. Abram *v.* Cunningham, 2 Lev. 182. 3 Bac. Abr. 50.

(^y) 11 Vin. Abr. 95. Abram *v.* Cunningham, 2 Mod. 146.

(^z) Com. Dig. Admon. B. 10. Baxter and Bale's Case, 1 Leon. 90. 11 Vin. Abr. 94.

after judgment released to the debtor, on which he brought an *audita querela*, and in the meantime the second administration was revoked, the release was held to be of no avail (^a).

Thus in all other cases the acts of the administrator are of no effect, where the administration is unlawful *ab initio*.

[129] If the grant were only voidable, then another distinction arises between the case of suit by citation, which is to countermand or revoke former letters of administration; and on appeal, which is always to reverse a former sentence (^b).

In case of an appeal, such intermediate acts of the administrator shall be ineffectual; because, as we have before seen, the appeal suspends the former sentence, and on its reversal it is as if it had never existed (^c).

But if administration be only voidable, and the suit be by citation, all lawful acts by the first administrator shall be valid, as a *bona fide* sale, or a gift by him of the goods of the intestate; and such gift shall be available, even if it were with intent to defeat the second administrator, or were made, *pendente lite*, on the citation; although by the stat. 13 Eliz. c. 5. it be void as to a creditor (^d). So if administration be committed to a creditor, and afterwards repealed on citation at the suit of the next of kin, such creditor shall retain against the rightful administrator; and his disposal of the goods pending the cause, and before sentence of repeal, shall be effectual (^e). If an administrator assign a term, and, on a subsequent citation to repeal the administration, it is confirmed, and on appeal the sentence is reversed, the assignment shall be good, for the repeal is merely of a sentence on citation, and therefore of the nature of a suit on such process; consequently the effect is the same as if the first administration had been avoided in such suit, and not as if an appeal had been brought in the first instance (^f).

But where an administrator sold a term in trust for himself,

(^a) Com. Dig. Admon. B. 10. Anon.
Dyer, 339. 6 Co. 19.

(^b) 6 Co. 18 b.

(^c) Allen v. Dundas, 3 Term Rep, 129.
11 Vin. Abr. 117.

(^d) Com. Dig. Admon. B. 9. 1 Salk.

38. 6 Co. 18 b. 11 Vin. Abr. 95.

(^e) Blackborough v. Davis, 1 Salk. 38.
11 Vin. Abr. 117. Thomas v. Butler,
1 Ventr. 219.

(^f) Syms v. Syms, Raym. 224. Semine
v. Semine, 2 Lev. 90. 11 Vin. Abr. 118.

although the administration were revoked on a suit by citation, and not on an appeal, the assignment was decreed to be set aside (^g).

Whether the administration be void or voidable, a *bonâ fide* payment to the administrator of a debt due to the estate shall be a legal discharge to the debtor, by analogy to the case before stated in regard to such payment under probate of a forged will (^h). In a case as early as the time of Charles the Second, where the administrator of the lessee paid rent to the administrator of the lessor, and the latter administration was repealed and granted to A, and he brought an action as well for the rent paid to the former administrator of the lessor, as for rent which accrued due subsequently to the repeal, and obtained a verdict and judgment for the same, the defendant was relieved in equity [131] in regard to the rent he had paid, inasmuch as he had paid it to the visible administrator (ⁱ).

This, however, is to be understood only where the grant is revoked on citation; if it be reversed on appeal, the administrator's authority was suspended by the appeal, and of course such payments shall be void.

But whether the administration be void or voidable, or be revoked on citation or appeal, if an action be brought by the administrator, and, while it is pending, administration is committed to another, the writ shall be abated (^k). [3]

Or if the administrator, before the repeal, obtain a judgment for a debt due to the intestate, he is not entitled to take out execution, but the defendant may avoid the judgment by an *audita querela* (^l). So, if the defendant be actually in execution, the

(^g) 11 Vin. Abr. 95. Jones *v.* Waller,
2 Ch. Ca. 129.

(^h) Allen *v.* Dundas, 3 Term Rep.
125. supr.

(ⁱ) 11 Vin. Abr. 117. Finch. Rep. 40.

(^k) 11 Vin. Abr. 118. Bro. Admon.
pl. 3.

(^l) 11 Vin. Abr. 102. 117. Com. Dig. Admon. B. 10. Turner *v.* Davies, 2 Sand.

149. S. C. 1 Mod. 62. Lut. 343.

[3] In the common case of intestacy, letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority. *Griffith v. Frazer*, 8 Cranch, 9. 21. *Royal v. Eppes, Adm'r. of Royal*, 2 Munford's Rep. 479.

judgment shall be vacated in the same manner, and the execution set aside (^m) : for in such cases the plaintiff had no authority but by virtue of a commission from the ordinary, and when that is determined, his authority is determined with it. But on affidavit to stay execution on a judgment recovered by an [132] administrator, on the ground that the letters of administration were repealed before the judgment entered, it was held that the matter did not come legally in question before the court, and that the party ought to bring an *audita querela* (ⁿ).

If administration be granted, and afterwards an executor appear, if the administrator have paid debts, legacies, or funeral expenses, he shall be allowed to deduct such payments in the damages recovered against him in an action by the executor (^o).

If administration have been granted to a creditor, he has a right to maintain it against the executor of a will afterwards produced, or the next of kin ; it is not to be revoked on mere suggestion, and he is at liberty to show cause why it should not be revoked (^p).

(^m) 11 Vin. Abr. 117. *Ket v. Life*,
Yelv. 125 3 Bac. Abr. 51.

(ⁿ) 11 Vin. Abr. 117. *Styl. 417.*

(^o) 3 Bac. Abr. 50. *Plow. 282.*

(^p) *Elme v. Da Costa*, 1 Phill. Rep.

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BOOK II.

OF THE RIGHTS AND INTERESTS OF EXECUTORS AND
ADMINISTRATORS.

CHAP. I.

OF THE GENERAL NATURE OF AN EXECUTOR'S OR ADMINIS-
TRATOR'S INTEREST—DISTRIBUTION OF THE SUBJECT
WITH REFERENCE TO THE DIFFERENT SPECIES OF THE
DECEASED'S PROPERTY.

AN executor or administrator represents the person of the testator or intestate in respect to his personal estate, the whole of which, generally speaking, vests in the executor immediately on the testator's death: in the administrator, on the grant of letters of administration^(a); and such grant hath relation to the time of the intestate's decease^(b).

The interest which such representative takes in the deceased's property is very different from that which belongs to him in regard to his own. Instead of being an absolute interest, it is only temporary and qualified. He is not entitled in his own [134] right, but in *autre droit*, in right of the deceased. He is intrusted merely with the custody and distribution of the effects^(c). [1]

(^a) Com. Dig. Admon. B. 10, 11. Co. Litt. 209. 3 Bac. Abr. 57. Off. Ex. Suppl. 47.

(^b) Com. Dig. Admon. B. 1. 2 Roll.

Abr. 554.

(^c) Off. Ex. 85. 88. Plowd. 182. 525. 11 Vin. Abr. 54. 9 Co. 88 b. Rutland v. Rutland, 2 P. Wms. 212.

[1] The possession of an administrator is in *autre droit*; and the personal estate of the decedent, including bonds, contracts, promises, and other *choses in action*, until accounted for by the payment of debts to the amount at least of their appraised value, continues liable in the hands of an executor or administrator; and the goods and moneys which were a decedent's at his decease are liable to be claimed in that right, so long as they are distinguishable in the hands of an executor or administrator, or in the hands of their representa-

Hence, if a tenant for years die, having appointed him who has the reversion in fee his executor, whereby the term of years

tives. And though the executor or administrator charge himself with the appraised value of the goods of the decedent, and settle his account in the probate office, the property is not thereby vested in him to the exclusion of the creditors. *Dawes, Judge, &c. v. Boylston*, 9 Mass. Rep. 337. But the property of the goods of a decedent will be considered as vested absolutely in the executor or administrator, after an administration to the full amount and value. *Weeks v. Gibbs*, 9 Mass. Rep. 74.

A power, accompanied with an interest, vests in the executors or administrators of the testator or intestate. *Kellog v. Williams*, Kirby's Rep. 316.

An executor is liable in respect to all the assets which come to his hands, whether they arise in the county where the letters testamentary are granted, or elsewhere, as in another state, or even in a foreign country. *Swearingen v. Pendleton*, 4 Serg. & R. 392.

Where a testator directs the money arising from certain sources (among which are the rents of his lands) to be placed out at interest, his executor is impliedly authorized to make leases of such lands, not already occupied by tenants, as are not necessary to be reserved for cultivation by the testator's own slaves. *McCall v. Peachy's Adm.* 3 Munford's Rep. 288.

In Connecticut, the administrator is accountable for the rents and profits of land, where the estate is insolvent. *Storer v. Hinkly*, 1 Root's Rep. 182.

An administrator has no power of charging the effects in his hands to be administered by any contract originating with himself; but his contracts in the course of his administration, or for the debts of his intestate, render him liable *de bonis propriis*. *Sumner, Adm. v. Williams & al.* 8 Mass. T. R. 199. *Foster v. Fuller*, 6 Ib. 58.

If a note be assigned to an executor or administrator as such, he can maintain an action upon it in that capacity. *Ib.* 190. And he may assign a negotiable note made to his testator or intestate; but if he endorse the note, he will be answerable personally, although he endorse it as executor or administrator. *Ibid.* So, if he give a deed of land with the usual covenants, he will be personally liable for a breach of the covenants. *Caswell v. Wendall*, 6 Mass. T. R. 108.

An executor may *ex officio* administer on any undevised estate of the testator, and it is not necessary that he be authorized by a letter of administration for that purpose: for the executor, by the probate of the will, has the administration of the testate estate, according to the will; and on undevised estate he is also directed to administer, agreeably to the provisions respecting intestate estates. *Hays & al. Ex'rs. v. Jackson & al.* 6 Mass. T. R. 149.

An administrator will not be allowed any charges, in his administration account, for the support and education of an infant child and heir of the intestate. *Brewster v. Brewster*, 8 Mass. T. R. 131.

It is no part of the duty of an administrator to advance his own funds for the benefit of the estate; and if he do, he will not be allowed interest therefor in his administration account. *Storer v. Storer*, 9 Mass. T. R. 37.

vests also in him, the term shall not merge, for he has the fee in his own right, and the term of years in right of the testator, and subject to his debts and legacies (^d). So if an executor be attainted of felony or treason, he incurs a forfeiture of all his own goods and chattels, but those of which he is possessed as executor shall not be forfeited (^e).

If he grant all his property, such as belongs to him in the character of executor shall not pass, unless he be so named in the grant (^f), or unless he have no other property (^g).

If he become bankrupt, the commissioners cannot seize the specific effects of the testator, not even in money, which specifically can be distinguished and ascertained to belong to the deceased, and not to the bankrupt himself (^h). Nor can the testator's goods be taken in execution for the executor's debt, either on a recognizance, statute, judgment, or for his debts of [135] whatever nature (ⁱ), unless there be sufficient evidence, either direct or presumptive, of the executor's having converted the goods to his own use (^k), or unless he consent to such seizure, and then it differs not from any other alienation; an execution acquiesced in being equivalent to a conveyance (^l).

Therefore, where an executor brought an action in the court of exchequer, suggesting that the defendant detained from him one hundred pounds, which he owed to him as executor of J. S. whereby he was the less able to pay a debt due from himself to the crown; the writ was abated, because the court could not intend that the king's debt could be satisfied by a judgment recovered by the plaintiff in that capacity (^m).

And where a creditor laid by for six or seven years, permitting the executor to remain in possession of the testator's

(¹) 2 Bl. Com. 177.

(^c) Marlow *v.* Smith, 2 P. Wms. 200.

(ⁱ) Off. Ex. 86. Vid. 2 Roll Abr 58. pl. 8. Ld. St. John's Case, 1 Leon. 263. Shep. Touch. 94. Marlow *v.* Smith, 2 P. Wms. 200.

(^e) Hutchinson *v.* Savage, Ld. Raym. 1307.

(^h) Copeman *v.* Gallant, 1 P. Wms. 319. Howard *v.* Jemmett, 3 Burr. 1369. Bourne *v.* Dodson, 1 Atk. 158.

(^j) 11 Vin. Abr. 272. Com. Dig. Admon. B. 10. Off. Ex. 86. R. Farr *v.* Newman, 4 Term Rep. 621. Buller J. contra. See also Whale *v.* Booth, ibid. 625. in note. and 632.

(^k) Vid. Farr *v.* Newman, and also Quick *v.* Staines, 1 Bos. & Pull. 293.

(^l) Per Lord Mansfield in Whale *v.* Booth.

(^m) Off. Ex. 87.

property, the court refused to restrain by injunction a creditor of the executor from taking in execution the goods of the testator for the executor's own debt⁽ⁿ⁾.

Nor can an executor bequeath the effects which he holds in that right^(o). And if he die without a will, his administrator shall not, as we may remember, intermeddle with the testator's estate. Nor, if an executor die in debt, shall the effects of the testator be liable, in the hands of the executor's representative, [136] to the payment of the executor's debts^(p).

So, if an executrix marry, all the personal chattels, of which she is possessed in her own right, are of course absolutely vested in the husband. But in respect of the goods of the testator, they are not transferred by the marriage^(q).

Nor if the husband of an executrix sue jointly with her for a debt due to her in that character, and she die after judgment, and before execution, can the husband have execution on the judgment; for although he were privy to the judgment, yet he shall not recover the debt, because it belongs to the testator's representative^(r). Nor shall a term in the hands of the husband, in right of his wife as administratrix, be extendible for his debt^(s).

But where A appointed his widow executrix, who continued in possession of his goods during three months after his death, and at the end of that time married B, and, for half a year after the marriage, the goods were treated by them both as the goods of B, it was held, that they might be taken in execution at the suit of B's creditor^(t).

Such is the nature of the interest to which an executor or [137] administrator is entitled in that right, and so distinguishable is it from that which pertains to him in his own.

The personal property, in which they are thus respectively interested, that is of a saleable nature, and may be converted into ready money, is called assets in the hands of the executor or administrator, that is, sufficient, from the French *assez*, to

⁽ⁿ⁾ Ray *v.* Ray, Coop. Rep. 264.

^(r) 1 Roll. Abr. 889. tit. Execution.

^(o) 11 Vin. Abr. 421. Plowd. 525. Off. Ex. 86.

^(s) Ridler *v.* Punter, Cro. Eliz. 291.

^(p) Off. Ex. 86.

^(t) Quick *v.* Staines, 2 Bos. & Pull. 293.

^(q) Off. Ex. 87.

make him chargeable to a creditor, and legatee, or party in distribution, so far as such goods and chattels extend (^a).

The personal effects comprehend so wide a circle, that in order to view them with any distinctness, it is necessary they should be arranged in a variety of classes.

I shall therefore first consider them as distinguished into chattels real, and chattels personal, in the deceased's possession at the time of his death.

I shall then treat of such as were not in his possession. And, Among such as were not in his possession, of things in action, as well those where the cause of action accrued in his lifetime, as those where it accrued after his death.

I shall then proceed to the examination of such chattels as [138] vest in the executor, or administrator, by condition, by remainder, or increase, by assignment, by limitation, and by election.

I shall next inquire what chattels go to the heir, successor, devisee, or remainder-man.

Then show to what the widow shall be entitled.

Then describe the nature of the interest of a donee *mortis causa*.

And lastly, point out how effects, which an executor or administrator takes in that character, may become his own.

(^a) 1 Bl. Com. 510. Off. Ex. Suppl. 53. Shep. Touchst. 496.

CHAP. II.

OF THE INTEREST OF AN EXECUTOR OR ADMINISTRATOR IN
THE CHATTELS REAL AND PERSONAL.

SECT. I.

Of his interest in the chattels real.

FIRST, the personal representative is entitled to the chattels real, that is, such as concern or savour of the realty, as terms for years of houses, or land, mortgages, the next presentation to a church, estates by statute merchant, statute staple, or elegit, interests for years in advowsons, commons, fairs, corodies, estovers, profits of leets, and the like. This species of chattels is styled by the civil law immoveable goods, and, inasmuch as they are interests issuing out of, or annexed to real estates, in the immobility of which they participate, by our law they are described as real: And also, as the utmost period of their existence is fixed and limited, either for such a space of time certain, or till such a particular sum be raised out of such a particular income, and consequently are distinguishable from the lowest estate of freehold, the duration of which is necessarily indeterminate, they are denominated chattels (^a).

[140] Lands devised to an executor for a term of years for payment of debts are assets in his hands (^b).

Leases are likewise assets to pay debts, although the executor assent to the devise of them (^c). And in case a term be devised to the executor, and he enter, and die before probate, the term shall be deemed to be legally vested in him by his entry, and the devise executed without the probate (^d). So a lease

(^a) 2 Bl. Com. 386. 3 Bac. Abr. 57, 58.
60, 61. Off. Ex. 53, 54. 73. 11 Vin.
Abr. 173. 227. Pynchyn v. Harris,
Cro. Jac. 371. Off. Ex. Suppl. 59.
5 Mass. Rep. 419.

(^b) 11 Vin. Abr. 240. 2 Brownl. 47.
(^c) 11 Vin. Abr. 233. Chamberlain v.
Chamberlain, 1 Chan. Ca. 257.

(^d) Dyer, 367 a.

for years determinable on lives is a chattel interest, and shall vest in the personal representative of such lessee (^e).

If an estate be granted to A *pur autre vie*, but not limited to his heirs, and A die in the lifetime of the *cestui que vie*, or of him by whose life it is holden, as there is no special occupant, the heir not being named in the grant, it shall, by the stat. 29 Car. 2. c. 3. go to the executor, and be assets in his hands for payment of debts, and after payment of the same, the surplus of such estate, by the stat. 14 Geo. 2. c. 20. shall go in a course of distribution like a chattel interest (^f). These statutes operate equally on grants of estates *pur autre vie* in incorporeal hereditaments; as if rent be granted to A during the life of another, [141] the rent by virtue of these provisions has been holden to continue in the representatives of the grantee dying in the lifetime of the *cestui que vie* (^g).

Where A, tenant for three lives to him and his heirs, assigned over his whole estate in the premises by lease and release to B and his heirs, reserving rent to A, his executors, administrators, and assigns, with a proviso that on non-payment A and his heirs might re-enter; and B covenanted to pay the rent to A, his executors and administrators; the rent was held payable to A's executor, and not to his heir, on the ground that there was no reversion to the assignor, and the rent was expressly reserved to the executor. That therefore the proviso for the heir to enter was not material, for the reservation of the rent being to the executor, the heir in case of re-entry would be a trustee for him (^h).

In case of a tenancy from year to year as long as both parties please, if the tenant die intestate, the same interest as the deceased had shall devolve on his administrator (ⁱ).

(^e) Off. Ex. 54.

(^f) 2 Bl. Com. 120. 258, 259, 260. Phillips *v.* Phillips, Prec. in Ch. 167. S. C. 1 P. Wms. 39. Duke of Devon *v.* Atkins, 2 P. Wms. 380. Vid. Atkinson adm'x. *v.* Baker, 4 Term Rep. 229. and 6 Term Rep. 291. Milner *v.* Lord Harewood, 18 Ves. 273.

(^g) Harg. Co. Litt. 41 b. Fearne's Con-ting. Rem. 232, 233. 3 P. Wms. 264. in'note. Kendal *v.* Michfield, Barnard-

ist. 46. Vid. also Stat. 5 Geo. 3. c. 17.

Sed vid. 2 Bl. Com. 260. Vaugh 291.

(^h) Jenison *v.* Lord Lexington, 1 P. Wms. 555.

(ⁱ) Doe on dem. Shore *v.* Porter, 3 Term Rep. 13. Vid. also Gulliver on dem. Tasker *v.* Burr, 1 Black. Rep. 596. Rex *v.* Willet, 6 Term Rep. 295. James *v.* Dean, 11 Ves. jun. 383. and 15 Ves. jun. 236.

If the testator were lessee for years, fish, rabbits, deer, and pigeons, shall belong to his executor as accessory chattels, partaking of the nature of their respective principals, namely, the pond, the warren, the park, and the dove-house (k).

If an executor hath a lease for years of land of the annual value of twenty pounds, rendering a rent of ten pounds a year, it shall be assets only for the ten pounds over and above the rent (l).

A reversion of a term is vested in the executor immediately on the testator's death, and shall be assets in his hands for its utmost value (m). If an executor renew, the new lease as well as the old shall be assets (n). If A be possessed of a term as [142] executor, and he purchase the reversion in fee, he is still chargeable for the assets in respect of the term, although it be extinguished, so that it shall be incapable of vesting in his executor (o). So, if the executor of the lessee surrender the lease, it shall be considered as assets, although the term be extinct (p).

So, where A seised of land in fee devised it to B for thirty-one years, for payment of debts, and appointed B his executor, and, during the term, the fee descended on B; it was adjudged, that, although by the descent of the inheritance, the term was merged as to him, yet that it was in *esse* as to creditors, and legatees, and should be assets in his hands (q).

If A have a term in right of his wife, as executrix, and he purchase the reversion, the term is extinct as to her, though she survive, but, in regard to a stranger, it shall be considered as assets in her hands (r). But, where A on his marriage demised lands to B, and B re-demised them to A for a shorter term, subject to a pepper-corn rent, during the life of A, and after his death, to an annual sum for the life of his wife, as her jointure, and a pepper-corn rent for the remainder of the term,

(k) Off. Ex. 53. 11 Vin. Abr. 166.
Harg. Co. Litt. 8. note 10.

(n) 3 Bac. Abr. 58. Anon. 2 Chan. Ca. 208.

(l) 3 Bac. Abr. 57. 11 Vin. Abr. 230.
pl. 42. S. C. 5 Co. 31. Off. Ex. Suppl.
55. Shep. Touchst. 498. *Body v. Har-*
grave, Cro. Eliz. 712. *Sed vid. Cro.*
Jac. 545.

(o) Off. Ex. Suppl. 55. 11 Vin. Abr.
227. pl. 16. 21. Shep. Touchst. 497.

(m) 11 Vin. Abr. 240. *Prattle v. King*,
2 Jo. 170

(p) 1 Co. 87 b. 11 Vin. Abr. 229.
(q) 11 Vin. Abr. 229. Off. Ex. Suppl.
76.

(r) 11 Vin. Abr. 236. Anon. Moore, 54.

[143] and A died, it was held, that the re-demised term should not be assets to pay any of his debts, except such as affected the inheritance, inasmuch as such term was raised for a particular purpose^(s). So, where A, on the marriage of his son B, settled a lease for years on him for life, and on the wife for life, and then on the issue of the marriage, and B covenanted to renew the lease from time to time, and to assign it on the same trust, and B renewed the lease in his own name, but made no assignment to the trustees, and died; the lease was held to be bound by the agreement on the marriage, and that it was not assets, nor liable to his debts^(t). Nor where a lease for years is granted on condition to be void on non-payment of rent, and the condition is broken, and the lessee afterwards dies, shall it be assets in the hands of his executor^(u). Nor is the trust of a term made assets by the statute of frauds in the hands of the executor of *cestuy que trust*^(w).

If the testator die in possession of a term for years, it shall vest in the executor; and, although it be worth nothing, he cannot waive it, for he must renounce the executorship in *toto*, or not at all^(x). But this is to be understood only where the executor has assets, for he may relinquish the lease, if the property be insufficient to pay the rent; yet in case there are assets to bear the loss for some years, though not during the whole term, it seems the executor is bound to continue tenant, till the fund is exhausted, when, on giving notice to the lessor, he may waive the possession^(y).

A leasehold estate in Ireland is considered as personal estate in England; but, whether a leasehold estate in Scotland is to be regarded in the same light, seems not to be settled^(z).

If A covenant to grant a lease for years to B, his executors, or administrators, and after B's death the lease is granted to his executor accordingly, it shall be assets^(a).

(s) 11 Vin. Abr. 236. *Baden v. Earl of Pembroke*, 2 Vern. 52. 213.

(t) 11 Vin. Abr. 237. *Goodfellow v. Burchett*, 2 Vern. 298.

(u) 11 Vin. Abr. 228. 2 Leon. 143.

(w) Vid. 11 Vin. Abr. 236. *Greaves v. Powell*, 2 Vern. 248. Vid. infr. Book III. c. 9.

(x) Com. Dig. Admon. B. 4. B. 10. 1 Sid. 266. *Fooler v. Cooke*, 1 Salk. 297.

Helier v. Casebert, 1 Lev. 127. *Bolton v. Cannon*, 1 Ventr. 271. supr. 42.

(y) Off. Ex. 120. vid. infr.

(z) 11 Vin. Abr. 239. *Bligh v. Earl Darnley*, 2 P. Wms. 622.

(a) *Shep. Touchst. 497*. infr.

So, if the lessor covenant to renew the lease at the request of the lessee, within the term, and the lessee does not make the request, but his executors make the request within the term, the lessor shall be compelled to renew the lease; for the executors of every person are implied in himself, and bound without being named (^b).

A grant of the next presentation to a living to J. S. during his life, is limited, and shall not carry the presentation to his executors, on his dying before the church becomes void (^c).

Among chattels real is also to be classed, the interest, styled in law, the *annum, diem, et vastum*, the year, day, and waste, that is, where a party, who is not tenant to the king, is attainted of felony, all his lands and tenements in fee simple are, after his death, forfeited to the crown, for a year and a day; and [145] the king, or his grantee, and therefore his executor during such period, hath not only a right to take the rents and profits of the estate, but also to commit upon it whatever waste he pleases (^d).

If rent be reserved on a lease for years, and the lessor die, the rent in arrear at the time of his death shall go to his executor (^e).

A lessee for years hath only a special interest and property in the fruit and shade of timber trees, so long as they are annexed to the land, but he has a general property in hedges, bushes, and trees not timber (^f), and consequently the same interest shall vest in his executor. If he be lessee without impeachment of waste, in that case he has a general property, as well in timber trees as others; but unless they are severed during the term, they shall not belong to him, or to his executor, but to the lessor, as annexed to the freehold.

Where such chattels concern corporeal hereditaments, as leases for years of houses or lands, the executor is not deemed to be in possession of them, till he is actually entered. But, in regard to such chattels as relate to incorporeal hereditaments,

(^b) Hyde *v.* Skinner, 2 P. Wms. 196.

Abr. 175.

(^c) 11 Vin Abr. 436. pl. 27, 28. Mann *v.* Bishop of Bristol, Cro. Car. 506.

(^e) Off. Ex. 53. Off. Ex. Suppl. 119.
3 Bac. Abr. 63.

(^d) 3 Bac. Abr. 61. Off. Ex. 54. 2 Bl. Com. 252. 4 Bl. Com. 385. 11 Vin.

(^f) Com. Dig. Biens. H. 4 Co. 62 b.
y. 90 b. 1 Roll. Rep. 181.

[146] as leases of tithes, the possession of the executor is necessarily constructive, because on them there can be no entry. At the instant therefore that the tithes are set out, in a place however remote, he shall be possessed of them in contemplation of law (^g).

If the lease be of a rectory, consisting not only of tithes, but also of glebe lands, then it appears that the executor is not in possession of the tithes, unless he enter upon the lands (^h).

The executor of tenant from year to year, of an estate under the annual value of ten pounds, may gain a settlement by residing on it for forty days (ⁱ).

SECT. II.

Of his interest in the chattels personal, animate, vegetable, and inanimate.

SECONDLY. Chattels personal are such things as are annexed to, or attendant on the person of the owner; and these, by the civil law, are denominated moveable. They are, also, to [147] be distinguished into animate, vegetable, and inanimate (^a).

The animate are also divided into such as are *domitæ*, and such as are *feræ naturæ*, some being of a tame, and others of a wild disposition. Those of a nature tame and domestic, as sheep, horses, kine, bullocks, poultry, and the like, are capable of an absolute property, and are transmissible, like all other personal chattels, to an executor. Those of a wild nature, as deer, hares, rabbits, pigeons, pheasants, partridges, and hawks, admit only of a qualified ownership. Therefore, unless they are reclaimed, that is, rendered tame by art, industry, and education, or confined so that they cannot escape, and enjoy their natural liberty, or, unless they are incapable, through weakness, of flying, or running away, they are *nullius in bonis*, not regarded in the

(g) Off. Ex. 108, 109. 11 Vin. Abr. 240.

Stone, 6 Term Rep. 29.

(h) Off. Ex. 109.

(^a) 2 Bl. Com. 387. 389. Off. Ex. 55,

(i) *The King v. The Inhabitants of*

56, 57.

light of private property, and consequently cannot pass to representatives^(b). But the animals I have just enumerated, provided they are tame, shall belong to the executor. He shall also be entitled to them, although not tame, if they be taken, and kept alive in any room, cage, or other receptacle^(c). Nor can an absolute property exist in fish at large in the water; but fish in a trunk shall go to the executor^(d). Also, hawks, herons, and other birds, rabbits and other creatures, in nests, or [148] burrows, if too young to fly, or run away, are all to be classed among personal chattels^(e).

Of the same description are hounds, greyhounds, and spaniels, and as accessory to such chattels, a hunter's horn, and a falconer's lure^(f). And since the executor's interest is co-extensive with that which was vested in the testator, the property in all his animals, however minute in point of value, shall go to the executor, as house-dogs, ferrets, and the like^(g); or although they were kept only for pleasure, curiosity, or whim, as lap-dogs, squirrels, parrots, and singing-birds^(h).

An executor shall, likewise, be entitled to deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, fish in a private pond, and, according to Bracton, to bees in a hive; if, as we have before seen⁽ⁱ⁾, the testator were lessee for years of the premises to which they respectively belong^(k).

These various animals are no longer the property of an individual, or transmissible to his representative, than while they continue in his possession. If they obtain their natural freedom, [149] his property instantly ceases, unless they have *animum revertendi*, which is to be known only by their custom of returning. The law, therefore, extends this possession farther than the mere manual occupation. The qualified property in a tame hawk is not divested by his pursuing his quarry in the presence of the sportsman, nor in pigeons, especially of the carrier kind,

^(b) 2 Bl. Com. 390, 391. Com. Dig. Biens. A. 2.

^(g) 3 Bac. Abr. 57. Off. Ex. 58.

^(c) Off. Ex. 53. 57.

^(h) 2 Bl. Com. 393.

^(d) Ibid. 53. 2 Bl. Com. 392.

⁽ⁱ⁾ Supr.

^(e) Off. Ex. 57. 2 Bl. Com. 394.

^(k) 2 Bl. Com. 393. Off. Ex. 53. Harg.

^(f) Ibid. 53. 57.

Co. Litt. 8. note 10.

by their flying at a distance from their home; nor in deer, by their being chased out of a park, or forest; nor in bees, by their flying from the hive, if they are immediately pursued by the keeper, forester, or owner. If they stray or fly without the knowledge of the owner, and return not in the usual manner, they are free, and open to the first occupant. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, the owner's property in him still continues; but, if the deer has been long absent without returning, such property shall cease (^k).

Personal effects, of a vegetable nature, are the fruit or other parts of a plant, or tree, when severed from the body of it, or the whole plant or tree itself, when severed from the ground; as apples or pears which are gathered or fallen, grass which is cut, and trees or their branches which are felled or lopped (^l).

There are, also, various vegetables, styled in law emblements, [150] which are deemed personal, and go to the executor, although they are affixed to the soil. They are so classed when they are raised annually by labour and manurance, which are considerations of a personal nature. The appellation of emblements, properly speaking, signifies the profits of sown land, but, in a larger sense, it extends to roots planted, or other annual artificial profit; it includes corn growing, hops, saffron, hemp, flax, and, as it seems, clover, saint-foin, and every other yearly production in which art and industry must combine with nature (^m).

On the same principle melons, cucumbers, artichokes, parsnips, carrots, turnips, and the like, belong to the executor (ⁿ). The executor of a tenant for life has also been held entitled to hops, although growing on ancient roots, as in the nature of emblements, in respect of the cultivation which is necessary to produce them (^o). Manure, in a heap, before it is spread on the land, is also a personal chattel (^p).

(^k) 2 Bl. Com. 392. Com. Dig. Biens. F. 7 Co. 17 b.

Co. Litt. 55 b. Anon. 2 Freem. 210.

(^l) 2 Bl. Com. 389. Off. Ex. 59.

(ⁿ) 4 Burn. Eccl. L. 254. 2 Bl. Com.

(^m) 2 Bl. Com. 122, 123. Termes de la ley Embl. Off. Ex. 59. 4 Burn. Eccl.

123. Roll. Abr. 728.

L. 255. Com. Dig. Biens. G. 1. Harg.

(^o) Harg. Co. Litt. 55 b. note 1. Cro. Car. 515.

(^p) 11 Vin. Abr. 175. Sty. 66.

Personal chattels inanimate are household goods, merchandise, money, pictures, jewels, garments; in short, every thing not included in the former classes, that can be properly put in [151] motion, and transferred from one place to another^(q).

There are, also, some other interests, which fall under the description of personal chattels. Of this species is the testator's property in the public funds.

The next advowson, before it becomes void, as I have already stated, is a chattel real, but, after an avoidance, it is a chattel personal^(r).

The executor also has an interest in the person of a debtor, in execution at the testator's suit; and without the executor's assent, the party cannot be discharged. This interest is in the nature of a personal chattel, inasmuch as the debtor is merely a pledge to secure the debt^(s). So, a prisoner taken in war is of the same species in respect of his ransom, and, on the captor's death, shall go to his executor^(t). Such, also, seems the interests in negro servants, purchased when captives of the nations with whom they are at war; though, accurately speaking, this property of the purchaser, (if it indeed continue), consists rather in their perpetual service, than in their bodies or persons; but, such as it is, it vests equally in the executor^(u).

[152] In general, however, a servant is legally discharged by the death of his master, and the executor has no claim to his service^(v). Nor has an executor any interest in an apprentice bound to the testator. The contract, in regard to instruction, is in its nature merely personal, and dies with the master. Yet, although an apprentice be not strictly transmissible, if, with the consent of all parties, and his own, he continue with the executor, it is a continuation of the apprenticeship^(w); provided, in the case of a trade, it be of the same species^(x).

^(q) 2 Bl. Com. 387. 389. Off. Ex. 57.

^(v) Off. Ex. 56.

^(r) 11 Vin. Abr. 173. Off. Ex. 54. 73.

^(w) Baxter v. Burfield, Stra. 1115.

^(s) 3 Bac. Abr. 57. Off. Ex. 56.

1266. Rex v. Stockland, Dougl. 70.

^(t) Off. Ex. 56. 2 Bl. Com. 402. Bro. Abr. tit. Propertie 18 L. of Test. 378.

1 Burn. Just. 82. et seq. 2 Ves. 35. sed vid. Off. Ex. 53. 56.

^(u) 2 Bl. Com. 403. Chamberlain v. Harvey, Carth. 396. Ld. Raym. 147. Smith v. Gould, Salk. 667.

^(x) Vid. stat. 5 Eliz. c. 4. 1 Bl. Com. 427, 428. et infr.

An interest in the testator's literary property may devolve on the executor, pursuant to several statutes (^y). An interest may likewise vest in him by virtue of a patent granted to the testator, for the invention of a new manufacture within the realm (^z).

It seems, also, that a caroome, or a license by the mayor of London to keep a cart, is a chattel interest, and belongs to the executor (^a).

The interest in all these chattels is, at the instant of the testator's death, vested in the executor; and from the death of the [153] intestate, by relation, in the administrator, whether he has reduced them into his actual possession, or not, and however widely dispersed, or remotely situated, they are regarded in law as assets in his hands (^c). Therefore, where the jury found assets in Ireland, the stating of them on the special verdict to be in Ireland, was holden surplusage (^d). So, if an executor live in London, and have left goods in Bristol, he hath such an immediate possession of the goods, that he may maintain trover for them in his own name (^e). In like manner he shall be deemed to be in possession of a ship at sea. In short, in whatever part of the world the testator hath left effects, the executor, whether in the manual occupation of them, or not, is deemed to all intents and purposes the possessor in point of law (^f). And even if goods be in fact taken out of his possession after he has administered, legally he is not divested of them; they are still esteemed assets in his hands (^g).

But, to give the executor a title, or to constitute assets, the absolute property of such chattels must have been vested in the testator; and, therefore, if A take a bond in trust for B, and [154] die, it shall form no part of the assets of A (^h). So, if

(^y) Stat. 8 Ann. c. 10. 15 Geo. 3. c. 53.
8 Geo. 2. c. 13. 7 Geo. 3. c. 38. 17 Geo.
3. c. 57.

(^z) Stat. 21 Jac. 1. c. 3.

(^a) 11 Vin. Abr. 151. Com. Dig. Biens.
B. Hunt *v.* Hunt, 2 Vern. 83.

(^c) Off. Ex. 108, 109. 3 Bac. Abr. 57.
Roll. Abr. 921.

(^d) 6 Co. 46 b. 11 Vin. Abr. 230.

(^e) 3 Bac. Abr. 58. in note. Jenkins
v. Plombe, 6 Mod. 181. R. in evidence

by Holt, C. J. Bolland et Ux. Adm'x.
v. Spencer, 7 Term Rep. 358. Munt
v. Stokes, 4 Term Rep. 563. Sed vid.
Cockerill et Ux. ex'x. *v.* Kynaston, 4
Term Rep. 277.

(^f) 3 Bac. 57. 11 Vin. Abr. 230. 240.
Shep. Touchst. 496.

(^g) Off. Ex. 113. Off. Ex. Suppl. 56.
5 Co. 33 b. 11 Vin. Abr. 230.

(^h) 3 Bac. Abr. 58. Deering *v.* Tor-
rington, Salk. 79.

the obligee assign a bond, and covenant not to revoke the assignment, the bond shall not be included among his assets (i).

Nor shall goods, bailed or delivered for a particular purpose, as to a carrier to convey to London, or to an innkeeper to secure in his inn, be assets in the hands of their respective executors. Nor, till the time for redemption is past (k), shall goods pledged or pawned in the hands of the executor of the pawnee, nor goods distrained for rent or other lawful cause, be regarded as the assets of the party distraining. Nor, if the testator were outlawed at the time of his death, shall his effects be so considered (l).

If A consent to a disposition of the goods of the intestate, and afterwards take out administration, he shall be bound by the antecedent gift (m): but, if the executor make a fraudulent gift of them, they shall continue assets (n).

Such deeds and writings as relate to terms for years, or other chattels, or are securities for debts, belong to the executor (o).

[155] Also, the property in the coffin, shroud, and other apparel of the dead body, remains in the executor (p).

Chattels, whether real or personal, may be held not only in severalty, but also in joint-tenancy. Thus, if a lease for years be granted, or a horse be given, to two or more persons absolutely, they are joint-tenants of it; and unless the jointure be severed, it shall be the exclusive property of the survivor (q). If the jointure be severed, as by either of them assigning his interest, or selling his share, the assignee or vendee, and the remaining lessee or part owner, shall be tenants in common without any *jus accrescendi*, or right of survivorship (r). So if a sum of money be given by will to two or more, equally to be divided between them, they shall be tenants in common (s). On

(i) *Ibid.*

(o) 3 Bac. Abr. 65. Off. Ex. 63. Jones v. Jones, 3 Bro. Ch. Rep. 80.

(k) *Vid. Shep. Touchst. 496.*

(p) 2 Bl. Com. 429.

(l) 2 Bl. Com. 395, 396. 3 Bac. Abr. 58. *Shep. Touchst. 498.*

(q) 2 Bl. Com. 399. Com. Dig. Estates. K. Litt. S. 281. Harg. Co. Litt. 46 b. and 182. note 1. Lady Shore v. Billingsly, 1 Vern. 482.

(n) Com. Dig. Admon. B. 10. Per two Just. Holt. C. J. contr. Whitehall v. Squire, 1 Salk. 295. S. C. 3 Salk. 161. S. C. Carth. 103. S. C. Skin. 274. S. C. 3 Mod. 276. vid. infr.

(r) Litt. S. 321. Com. Dig. Estates. K. 5. Sym's Case, Cro. Eliz. 33.

(s) 3 Bac. Abr. 58. Cro. Eliz. 405.

(t) 1 Eq. Ca. Abr. 292.

the principle also of encouraging husbandry, and commerce, stock on a farm, although occupied jointly, or stock of a partnership in trade, shall always, independently of any express contract to that effect, be considered as common, and not as joint property ; and therefore in these instances there shall be no survivorship, but the interest of the party dying shall vest in his executor^(t). At law, it is true, the remedy survives, yet [156] the duty does not survive ; and, therefore, if one of two joint merchants die, the action for money due to them survives for the survivor, and the executor of the deceased cannot join in an action. But the survivor, on recovery, is liable to an action of account by the executor^(u). Such actions, however, are in a great measure superseded, by the more effectual jurisdiction of a court of equity in matters of account.

Chattels personal in the hands of an executor may, in certain cases, be changed into chattels real, and so *vice versa* ; as, if a debt be due to J. S. as executor, on statute, recognizance, or judgment, and he sue out execution, and take the lands of the debtor in extent, the personal duty is, in that case, converted into a chattel real : On the other hand, if such estate, by extent or a mortgaged term, devolve on an executor, and the debtor or mortgagor pay the money due, such chattels real are turned into chattels personal^(x). [1]

(t) 2 Bl. Com. 399. Com. Dig. Merchant D. Harg. Co. Litt. 182. and note 4. 2 Browl. 99. Noy. 55. Jeffereys v. Small, 1 Vern. 217. Kemp v. Andrews, Carth. 170. See Lake v. Craddock, 3

P. Wms. 161.

(u) Martin v. Crump, Salk. 444. Kemp v. Andrews, Show. 188.

(x) Off. Ex. 75. 3 Bl. Com. 420.

[1] In many, especially in the commercial states of the Union, every species of real estate, as well as chattel interest, is made assets in the hands of the executor or administrator, for payment of the debts of the decedent.

In Vermont and New Hampshire, it is enacted, that, when the personal estate of a decedent shall be insufficient to pay his debts and the legacies bequeathed by him, the judge of probate may authorize the executor or administrator to sell so much of the real estate of the deceased, as will satisfy such debts and legacies.

In Rhode Island, on a deficiency of personal estate, the Supreme Judicial Court, at any term thereof in the county in which the decedent last dwelt, may empower the executor or administrator to sell so much of the real estate as

shall be necessary to pay the debts, the expenses of the funeral, and the maintenance of the family of the decedent, together with the incidental charges. Thirty days' public notice of sale is to be given in the town where the real estate lies, and also in the two next adjoining towns.

In Massachusetts, the same provisions are enacted; save that the Courts of Common Pleas in the counties respectively have concurrent authority with the Supreme Court. *6 Mass. Rep.* 149. 394, 395.

In Connecticut, when the debts and charges allowed by any court of probate in the settlement of any intestate estate, or of a testate estate, where sufficient provision is not made by the will of the testator, cannot be fully paid out of the personal estate, without prejudice to the widow or heirs, by depriving them of their necessary stock and implements for farming, or other business for upholding life, the judge of such Court of Probate shall have power and authority to order payment of such part of the debts and charges as he shall judge reasonable, by disposing of the lands or real estate for that purpose, in such way and manner as he shall judge to be most equitable and beneficial for the widow and heirs, or devisees of such estate; any law or usage to the contrary notwithstanding.

In New York, when the personal estate is exhausted, the executor or administrator must present to the judge of probate, or the surrogate, of the county in which the probate or administration shall have been had, a true and just account of the personal estate and debts. Upon this the judge or surrogate makes an order, directing all persons interested to appear before him at a time and place indicated in the order, not less than six nor more than ten weeks after its date, to show cause why so much of the real estate of the decedent shall not be sold, as will be sufficient to pay his debts. After publication of such order for four weeks successively in two or more of the public newspapers, the judge or surrogate having examined the proofs and allegations of the executors or administrators, and of such other persons as may have appeared, and finding the insufficiency of the personal estate, may direct the whole, or so much of the real estate to be sold, as will pay his debts.

In New Jersey, the like provisions are enacted, except that the powers of the surrogate are given to the Orphan's Court.

In Pennsylvania and Delaware, if the personal estate of the decedent be insufficient to pay his debts and support his minor children, or if, on a final settlement of the accounts of the executor or administrator, in relation to the personality, a deficit be apparent, the Orphan's Court may authorize the executor or administrator to sell so much of the real estate as may be sufficient to pay the debts of the decedent.

In Delaware, also, if the widow and children, or devisee of a testator, who have lands left him or them, being of the age of twenty-one years, or the guardians of such as are under that age, shall neglect and refuse to pay the debts of the decedent remaining unpaid, in proportion to each devisee's share, after a just settlement of the personal estate in the Orphan's Court, the executor may, by order of the Orphan's Court, sell and convey so much of the lands and tenements of the decedent, in proportion to each devisee's share, as the Court shall deem sufficient to pay the debts of such decedent.

In Maryland, the real estate of a decedent can be subjected to the payment of debts only by bill in Chancery. Judgments against the executor or administrator do not bind lands. And it is provided, that "Leases for years, estates for the life of another person, except those granted to the deceased and his heirs only, and all goods, wares, merchandise, utensils, furniture, negroes, cattle, stock, provisions, tobacco, and every kind of produce, the crop on the land of the deceased by him begun, unless where the lands are divided, things annexed to the freehold or buildings, which may be removed without prejudice to the building, clothing, ornaments, and every other species of personal property, (except those things which are denominated heirlooms, and the clothes of a widow, and ornaments and jewels proper for her station, and the clothing of the family,) shall be included in an inventory, and considered as assets in the hands of an executor or administrator."

In North Carolina and Tennessee, real estate is assets for the payment of debts; but it cannot be sold by execution, on a judgment against executors or administrators. A *sci. fa.* must first issue to the terre tenants, on which they may contest the want of personal assets in the hands of the executor or administrator.

In South Carolina, lands are assets, and may be sold indiscriminately with personal estate, on judgment against executors or administrators.

In Georgia, on the application of executors or administrators, a part or the whole of the real estate of a testator or intestate may be sold, by order of the inferior county Courts, if it be made fully and plainly to appear beneficial to the heirs or creditors of such estate.

In Alabama and Missouri, lands are assets after the exhaustion of the personal estate, and may be sold, but not by execution; it must be by an order of Court, upon a representation of an executor or administrator.

In Mississippi, Louisiana, and Illinois, real estate is assets, and may be sold on judgment against the executor or administrator.

In Indiana, lands may be sold for the payment of debts, by order of the probate Court; and it *seems*, upon judgment against executors or administrators.

Under these statutory regulations, it has been decided, that an administrator has no interest in the lands of his intestate, unless they have been mortgaged to him; and having no right of entry, he cannot bring any real action to recover seisin or possession of them. *Drinkwater v. Drinkwater*, 4 Mass. T. R. 354. But he may lawfully sell lands which are liable for the payment of the intestate's debts on license, whether they be in possession of the heir or of his aliene, or of a devisee. For no seisin of the heir, nor of his aliene, nor of the devisee, can defeat the naked authority of the administrator to sell on license. *Ibid. Willard v. Nason, Adm'x.* 5 Mass. T. R. 240. *Hays & al. v. Jackson & al.* 6 Mass. Rep. 149.

But lands are not liable for the payment of the debts of a deceased person as his lands, unless he died seised of them, or had fraudulently conveyed them, or were colourably and fraudulently disseised of them, with the intent to defraud his creditors. *Willard v. Nason, Adm'x.* 5 Mass. Rep. 240.

If an executor or administrator, in the sale of the real estate of the deceased, do not comply with the requisites of the Statutes, as by giving bonds to at-

count, taking the previous oath, advertising and making a public sale, yet strangers to the title, those who have no estate nor privity of estate nor interest, and who pretend to none, cannot avail themselves of a want of compliance with these requisites, if the executor or administrator be otherwise duly authorized to sell, and have given a deed recited to be made upon a sale pursuant to that authority. *Knox & al. v. Jenks*, 7 Mass. Rep. 488. *Gray v. Gardner*, 3 Mass. T. R. 399. *Coleman & al. v. Anderson*, 10 Mass. T. R. 105. *Perkins v. Fairfield*, 11 Ib. 227. But heirs at law, creditors, and others concerned in the estate to be conveyed, and whose interests are affected by the authority to sell, and those claiming under them, are not concluded by the exercise of the authority and license to sell in derogation of their rights, unless every essential requisite and direction of the law have been complied with. *Ibid. Ibid. Ibid. Ibid.* Yet even heirs and creditors are concluded after a long acquiescence; and a legal presumption of the regular exercise of the authority is accepted instead of proof. *Ib. Ib. Ib. Ib.*

If an executor or administrator sell the lands of the deceased for the payment of his debts, pursuant to an order of Court for that purpose, one claiming as heir shall not afterwards avoid the sale, by proving that there were sufficient personal assets for payment of the debts; but the order of the Court, having competent jurisdiction, shall be conclusive evidence of the authority to sell, and the sale shall be valid. *Leveritt v. Harris*, 7 Mass. Rep. 292.

An administrator, acting under a license, and exercising an authority to sell the real estate of his intestate, is not required, by any duty of his office or trust, to enter into a personal covenant for the absolute perfection of the title which he undertakes to convey, or for the validity of the conveyance, beyond his own acts. *Sumner, Adm. v. Williams & al.* 8 Mass. Rep. 162. 201. But if he do enter into such a covenant, he will be liable thereon *de bonis propriis*. *Ibid.*

So, if he enter into covenants expressed to be made in his *capacity of administrator*, respecting the title of his intestate, such covenants will necessarily be considered as personal covenants, for which he will be liable *de bonis propriis*; because the effects of the intestate are not liable to the contract of an administrator as such, and because an express contract of that kind can have, no other legal operation. *Ibid.* 162. Sedgwick, J. dissentient.

The administrator cannot defend in any real action brought against him as administrator, by any person claiming as a purchaser from the intestate, whether the purchase be *bona fide* or fraudulent as to creditors. *Drinkwater v. Drinkwater*, 4 Mass. Rep. 354.

Under the Statute of 1788, c. 51, an executor or administrator to whom land is set off, on execution, takes an estate in such land in trust for the heirs, &c. and neither the legal estate nor the possession vests in the heirs, until the land is apportioned and distributed in the probate office, or until the administration has been settled, or it is ascertained that it will not be wanted for the payment of debts. And the administration bond is a security for the faithful administration of such land, it being only a substitute for money due to the testator or intestate. The executor or administrator may maintain an action for the same land against a stranger in possession. *Boylston v. Carver*, 4 Mass. Rep. 611. *Willard v. Nason*, 5 Mass. T. R. 240.

An administrator cannot administer on lands, but by selling them according to a license duly granted, and by appropriating the proceeds to the discharge of the intestate's debts. *Dean v. Dean*, 3 Mass. Rep. 258. *Drinkwater v. Drinkwater*, 4 Ibid. 354. *Mitchell v. Lunt*, 4 Ibid. 654. Nor can the intestate's lands be sold to defray the expenses of administration; the personal estate alone is a fund for the payment of those charges. But the Court, in granting license to sell the real estate of the intestate for the payment of his debts, may also authorize the administrator to sell lands enough to pay the incidental charges of sale; it being an expense which he must necessarily incur, in pursuing his authority. *Ibid. Ibid.*

If an administrator enter upon the lands of the intestate, and receive the rents and profits, they will become a part of the fund, if wanted for the payment of the debts; and if not wanted, they will form a part of the distributive shares of the personal estate; although in law, the administrator has no right to enter upon the lands, or to take the profits. *Drinkwater v. Drinkwater*, Adm. 4 Mass. Rep. 354.

In granting license to an executor to sell the real estate of his testator for the payment of debts, the Court will marshal the assets according to the following rule:—1. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts.—2. The real estate which is appropriated in the will as a fund for the payment of debts.—3. The descended estate, whether the testator were seized of it when the will was made, or it were after acquired.—4. The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose. *Hays & al. Ex'rs. v. Jackson & al.* 6 Mass. T. R. 149.

But the rents and profits of the descended estate, received by the heir after the testator's death, cannot be come at to be marshalled as assets. *Ibid.*

Lands in another state are not assets within Massachusetts. *Austin v. Gage et al.* 9 Mass. Rep. 395.

The executor or administrator has no occasion for a license to sell the deceased's interest in lands, held under a lease for 999 years; for such interest is but a chattel, which he may dispose of in the same manner as he may of the other personal property of the decedent. *Ex parte Gay*, Adm. 5 Mass. R. 419.

The money due on mortgage in fee is assets for the payment of debts; and the land will be ordered to be sold to raise the money for that purpose, if the heir of the mortgagee will not save the land by paying the money as he may. 8 Mass. Rep. 554.

In Connecticut, an executor hath no right to lands, unless wanted to pay debts, or to answer some purpose expressed in the will. 1 Root's Rep. 518. 2 Ibid. 438.

In Pennsylvania, real and personal estates are both funds for the payment of debts. The lands of a decedent are bound for his debts, though in the hands of a *bona fide* purchaser from the heir. *Graff v. Smith's Adm'rs.* 1 Dall. 481. *Morris's Less. v. Smith*, 1 Yeates, 238. S. C. 4 Dall. 119. And though lands do not pass into the hands of the executor in the same way that chattels do, they are liable to be seized and sold in like manner as if they did. *Wilcox v.*

Watson, 1 Peters' Rep. 273. The plaintiff is not bound to sue out a *sci. fa.* against the heirs or terre tenants of his debtor, in order to charge the lands of which they are seized. *Ibid.* Therefore, to a *sci. fa.* against an executor to revive a judgment obtained against his testator, the defendant cannot plead that there are terre tenants, whose lands are bound by the judgment. *Ibid.*

Under Sect. 14. of the Act of April 19th, 1794, assets, arising from the sale of *real* as well as personal estate of decedents, must be averaged among the creditors. *Workring v. Stewart & al.* 2 Yeates, 483.

The executor of a *cestui que trust*, entitled to a sum of money under a marriage contract, has a right to call for the application of the personal estate to discharge the debt, in aid of the real estate devised to the *cestui que trust*, in part performance; but such executor cannot resort to the real estate devised to the *cestui que trust*, in the hands of her heirs; but the land of the obligee, devised to other persons, is liable. *Bryant v. Hunter*, C. C. April, 1811. Wharton's Digest, 356.

If a devisee or one of the heirs of a decedent, loses his lands by an execution, he is entitled to a contribution from the owners of the remaining part of such decedent's estate. *Guier v. Kelly*, 2 Binn. 219. *Graff v. Smith's Ex'r's*. 1 Dall. 481.

By the Act of April 4th, 1797, no debts of a decedent shall remain a lien longer than seven years from his decease, unless secured by mortgage, judgment, recognizance, or other record.

But where a testator gave his executors power to sell so much of his remaining lands as should be sufficient to pay his debts, and, instead of selling, the executors made an arrangement with the residuary devisees, by which each devisee was to have his part on paying a proportion of the testator's debts, it was held, that the debts remained a lien longer than seven years, notwithstanding this act, and that a purchaser under one of the devisees took it subject to such lien. *Miller v. Stout*, 2 Browne, 294.

It is not necessary, if there are several orders of sale, that there should be debts unpaid, as well as children to support, at the time each order of sale is made. If there have been two sales, the proceeds of which extinguished all the debts, a third sale for the maintenance of children is nevertheless good. And it is not necessary that the accounts of an administrator should be settled previous to a decree for sale of the intestate's land. *Huckle v. Phillips*, 2 Serg. & R. 4.

Under the Act of April 1st, 1814, the Court has power to order a sale of real estate, to satisfy the debts of an intestate, by one administrator, where there are several. *Bickel v. Young & al.* 3 Serg. & R. 234.

A purchaser under a sale by order of the Orphan's Court, takes the land discharged from the lien of the intestate's debts, and from the lien of judgments, but not from that of mortgages. *Graff v. Smith's Adm.* 1 Dall. 481. *Moliere's Less. v. Noe*, 4 Dall. 450. But it behooves such purchaser to see that the proceedings are so far regular as to authorize a sale. *Messenger v. Kintner*, 4 Binn. 104. *Larrimer v. Irwin*, cited *ibid.* *Snyder's Less. v. Snyder*, 6 Binn 483.

It is the practice in Pennsylvania, where there is a sale of lands of a testator under an execution, to pay the surplus, beyond what will satisfy the execution,

to the executor, in whose hands it is assets for the payment of other debts. *Guier v. Kelly*, 2 Binn. 298. *Commonwealth v. Rahm & al.* 2 Serg. & R. 375. And such payment is good against the heir, unless he have previously given notice to the sheriff not to pay to the executor or administrator, or have made application to the Court for an order on the sheriff to pay the money into Court. *Ibid.*

An outstanding debt due to the decedent is not assets in the hands of his executors or administrators, where there has not been gross negligence, or collusive, fraudulent, and unreasonable delay, in collecting it. *Ruggles v. Sherman*, 14 Johns. Rep. 446.

CHAP. III.

OF THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR IN
SUCH OF THE CHATTELS AS WERE NOT IN THE DECEASED'S
POSSESSION AT THE TIME OF HIS DEATH.

SECT. I.

Of his interest in choses in action.

I PROCEED now to treat of such of the testator's effects as were not in his possession at the time of his death ; and in this class I am first to consider *choses*, or things in action, as well those where the cause of action accrued in the testator's lifetime, as those where it accrued after his death.

In regard to the first, the executor is entitled to the testator's debts of every description, either debts of record, as judgments, statutes, and recognizances ; or debts due on special contracts, as for rent ; or on bonds, covenants, and the like under seal ; or debts on simple contracts, as notes unsealed, and promises not in writing, either express or implied ; and all such debts, when received by the executor, shall be assets in his hands (^a).

[158] An executor is also entitled, pursuant to stat. 4 Ed. 3. c. 7. to a compensation in damages for a trespass committed on the testator's goods in his lifetime ; and by the equity of that statute, for a conversion of the same, or for trespass with cattle in his close (^b) ; or for cutting his growing corn, which is a chattel, and carrying it away at the same time (^c) ; and by the same liberal construction of the above-mentioned statute, the executor is also entitled to a debt accrued to the testator under the stat. of 2 & 3 Ed. 6. c. 13. for not setting out tithes (^d) ; to

(^a) Off. Ex. 65. 3 Bac. Abr. 59. Com. Dig. Admon. B. 13.

(^b) 3 Bac. Abr. 59. Com. Dig. Admon. B. 13. Off. Ex. 70. Lat. 168. 2 Johns. Rep. 227.

(^c) Emerson v. Emerson, 1 Ventr. 187.

(^d) Holl v. Bradford, 1 Sid. 88. 407. Moreton's Case, 1 Ventr. 30. Poph. 189.

a *quare impedit*, for a disturbance of his patronage^(e); to ejectment, for ejecting him^(f); and, in short, to every other injury done to his personal estate previously to his death.

An executor shall also have damages for the breach of a covenant to do a personal thing^(g); and although the covenant sound in the realty, as for not assuring lands, yet if it be broken in the testator's lifetime, the executor shall be entitled to damages^(h); and the damages in any of these cases, when recovered, shall be regarded as assets.

So the executor of the assignee of a bail-bond shall recover [159] on that instrument, inasmuch as it is a vested interest⁽ⁱ⁾.

So an executor is entitled to damages against a sheriff for permitting a party in execution on a judgment recovered by the testator to escape; even although the escape happened in the testator's lifetime^(k). [1] An executor may also demand damages of a sheriff for not returning his writ, and paying money levied on a *fieri facias*^(l); or for a false return stating that he had not levied the whole debt, when in fact he had^(m). So, if the testator in his lifetime were entitled to a writ of error, or *audita querela*, or to the antiquated remedies of attaint, *deceit*, or *identitate nominis*, the executor has a right to recover such compensation as the testator might have claimed; and whatever he so recovers shall be assets in his hands⁽ⁿ⁾. So, an executor is entitled to replevy goods of the testator^(o); or to recover damages of an officer for removing goods taken in execution before the testator, who was the landlord, had been paid

(e) Off. Ex. 66, 67.

(k) Com. Dig. Admon. B. 13. Spur-stow *v.* Prince, Cro. Car. 297. Mod. Ca. 126.

(f) Poph. 189.

(l) Com. Dig. Admon. B. 13. Spur-stow *v.* Price, Cro. Car. 297.

(g) Lat. 168. 3 Bac. Abr. 59.

(m) Williams *v.* Crey, 1 Salk. 12.

(h) Com. Dig. Admon. B. 13. Com. Dig. Covenant. B. 1. Lucy *v.* Levington, 1 Ventr. 176. Ib. Cooke *v.* Fountain, 347. Lucy *v.* Levington, 2 Lev. 26. Off. Ex. 65. 4 Johns. Rep. 42.

(n) 3 Bac. Abr. 60. Off. Ex. 71.

(i) Com. Dig. Admon. B. 13. Fortes, 367.

(o) 1 Sid. 82. Off. Ex. 66.

[1] But debt will not lie against the executors or administrators of a sheriff, for an escape in the lifetime of their testator or intestate. *Martin v. Bradley*, 1 Caine's Rep. 124.

a year's rent (^p). And, in general, an executor has a right to a compensation, whenever the testator's personal estate has been damaged, and the wrong remains unredressed at the time of his death.

[160] But an executor has no right to an action for an injury done to the person of the testator (^q) ; nor for a prejudice to his freehold ; as for felling trees, or cutting the grass, for the trees and grass are parcel of the same (^r). [2]

An executor shall also have the benefit of any equitable title of the testator in respect to personal property ; and money recovered by the executor by decree in a court of equity shall be assets (^s).

In all the above-mentioned cases, I suppose the cause of action to have accrued before the death of the testator. But where it accrues after that event, the executor is equally entitled to the debt, or damages.

Therefore, if A contract to deliver certain goods to B on a certain day, and they are not delivered in the lifetime of B, but after his death to his executor, he shall be possessed of them in that character, and they shall be assets in his hands ; as in case the contract had not been performed, damages recovered for the non-performance would have been so considered (^t). So if A covenant with B to grant him a lease of certain land by a certain day, and B die before the day, and before the grant of the lease, A is bound to grant it to the executor of B, and it shall [161] be vested in him as executor, and consequently be assets (^u).

(^p) Com. Dig. Admon. B. 13. Palgrave v. Windham, Stra. 212.

(^q) Lat. 168, 169. 1 And. 243. Mason v. Dixon, Jon. 174.

(^r) Emerson v. Emerson, 1 Ventr. 187. Off. Ex. 68.

(^s) 3 Bac. Abr. 59. Harecourt v. Wrenham, Moore, 858. Ratcliff v. Graves, 2 Chan. Ca. 152. Brownl. 76.

(^t) Off. Ex. 82.

(^u) Off. Ex. 82. 11 Vin. Abr. 231. L. of Ni. Pri. 158. supr. 144.

[2] But in Connecticut, it has been determined, that an action of trespass for entering on the intestate's lands and burning his mills, in his lifetime, survives to the administrator. *Griswold v. Brown*, 1 Day's Cas. 150.

And an administrator may maintain trover against a stranger for the conversion of a title-deed of the plaintiff's intestate, which took place during the life of the intestate. *Fowle v. Lovet*, 6 Mass. T. R. 394.

Or, if A refuse to grant the lease, he is liable to make a compensation to the executor of B in damages, which shall also be assets (v).

So where a father, possessed of a term for years held of the church, renewable every seven years, assigned the lease to his son in trust for himself for life, remainder in trust for the son, his executors, administrators, and assigns; and the father covenanted to renew the lease every seven years as long as he should live. The son died, and the seven years elapsed, when the executors of the son filed a bill to compel the father to renew the lease at his own expense. It was decreed accordingly (w).

A bail-bond may also be assigned to a deceased plaintiff's executor, and he shall be equally entitled to recover upon it, as if it had been assigned to the testator in his lifetime (x).

If a defendant in execution at the testator's suit escape after the testator's death, the executor shall recover damages for the escape, and the damages so recovered shall be assets (y). So an executor is entitled to replevy goods taken after the death of the testator (z). So, if A die possessed of a term for years in an advowson, such term shall vest in his executors; and in case of their being disturbed, they shall recover damages in a *quare impedit*, and such damages shall be assets (a).

If an executor have an equitable title to property in that character, and he institute a suit for the same, and it be decreed to him in a court of equity, it shall also be assets (b).

Where the cause of action accrued before the testator's death, [162] neither debts nor damages shall be assets, till they are actually recovered by judgment, and levied by execution, or otherwise reduced into possession (c).

Nor shall the balance of an account stated with the executor subsequently to the testator's death be assets, unless he has recovered the same, and has it actually in his hands: for the

(v) Plowd. 286.

(a) Ibid.

(w) Husband v. Pollard, Feb. 17-18-19, cited 2 P. Wms. 467.

(b) Com. Dig. Assets C. Roll. Abr. 920.
Harcourt v. Wrenham, Moore, 858.

(x) Fortes. 370.

(c) 11 Vin. Abr. 239, 240. 3 Bac. Abr.

(y) Com. Dig. Admon. B. 13. Godb. 262. Vid. 1 Roll. Rep. 276.

60. Jenkins v. Plume, 1 Salk. 207.
Shep. Touchst. 497

(z) Off. Ex. 36.

promise to the executor on the account stated, creates no new cause of action, but ascertains merely the old cause of action which existed in the testator's lifetime (^d). But such debts or damages recovered may be assets, although never, in point of fact, received, as, if they be released by the executor. For the release, in contemplation of law, shall amount to a receipt (^e).

Where the cause of action accrues after the testator's death, the debt or damages shall be assets immediately. As where money was had and received by the defendant, to the use of the plaintiff as executor, it was held, that if the defendant received the money by the consent or appointment of the plaintiff, it was assets in his hands immediately; if without his consent, yet the bringing of the action was such a consent, as that on judgment obtained it should be assets immediately without execution (^f).

[163] If a covenant affect the realty, and the breach be subsequent to the testator's death, the heir, and not the executor, as is hereafter shown, shall be entitled to the damages.

If a joint merchant die, his interest in the *chooses in action* belonging to the partnership devolves on his executor in the same manner as the other joint property (^g). It has been even held that the executor of the deceased shall join with the surviving merchant in an action for goods carried away, or money had and received in the testator's lifetime (^h). But it has been doubted whether the executor and surviving partner must, or can join in such action (ⁱ), and it has been adjudged to the contrary, and such adjudication seems now to be established, on the ground that although the duty survive not, the remedy does survive, and therefore must be enforced by the latter alone (^k), who will still be accountable to the executor as above stated (^l).

(^d) 11 Vilm. Abr. 240. Jenkins *v.* Plume, 1 Salk. 207.

(^e) 3 Bac. Abr. 60. Cooke *v.* Jennor, Hob. 66. Brightman *v.* Keighley, Cro. Eliz. 43.

(^f) Jenkins *v.* Plume, 1 Salk. 207.

(^g) Harg. Co. Litt. 182. Com. Dig. Merchant. D.

(^h) Com. Dig. Merchant. D. Hall *v.*

Huffam, 2 Lev. 188. and 228. S. C. 1 Freem. 468.

(ⁱ) Kemp *v.* Andrews, Show. 189. S. C. 3 Lev. 290, 291.

(^k) Kemp *v.* Andrews, Carth. 170. Martin *v.* Crump, Salk. 444. Vid. S. C. 1 Ld. Raym. 340. and Smith *v.* Barrow, 2 Term Rep. 476.

(^l) Supr. 155.

[164] SECT. II.

Of interests vested in him by condition, by remainder or increase, by assignment, by limitation, and by election.

AN executor may become entitled in such character to chattels real or personal by condition. As if a lease for years, or other chattel, has been granted by the testator to A, on condition that if A do not pay a certain sum of money, or perform some other specific act, within a limited time, the grant shall be void, and the condition is not performed, such chattel shall result to the executor, and be assets^(a). So, where the condition is, that the testator, or his executors, shall pay a sum of money to avoid the grant, and the executor shall pay it accordingly: As if A mortgage a lease, or pledge a jewel, or piece of plate, and before the day limited for redemption or payment die, his executor is entitled to redeem at the day and place appointed^(b). If he redeem with the testator's money, such chattels shall be assets^(c). If he redeem with his own money, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the sale of the [165] chattel itself; and in that case, the surplus over and above such indemnity shall be assets^(d). In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right^(e). But if the executor disbursed his own money to redeem, after the time specified for redemption is elapsed, then it is said that the chattel, without any distinction in respect of its value, shall at law belong to the executor in his own right; since in such case it must be deemed to be sold to him by the mortgagee or pawnee, who, after the forfeiture is incurred, has a legal right to dispose

(^a) Off. Ex. 76.

(^b) Ibid. 76, 77. *Cortelyon v. Lansing*, 2 Caine's Cas. 200.

(^c) Ibid. 81.

(^d) 3 Bac. Abr. 58, 59. in note. Off.

Ex. 79. 2 Fonbl. 404. n. f. *Dawes v. Boylston*, 9 Mass. T. R. 337.

(^e) 3 Bac. Abr. 58. Kellw. 63.

of it at his pleasure to him, or to any other person. But in equity, the excess in the value of the thing beyond the money paid for the redemption shall be regarded as assets in the hands of the executor (^f).

Chattels which were never vested in the testator in possession, may accrue to an executor by remainder, or increase. As, if a lease be granted to A for life, remainder to his executors for years, such remainder shall be assets in the hands of his executor, though it could never come into the possession of the testator. In like manner, where a lease for years is given [166] by will to A for life, and on his death to B, and B dies before A, although the term were never in B, yet it shall devolve on his executor, and be assets. So a remainder in a term for years, though it never vested in the testator's possession, and though it continue a remainder, shall go to the executor, and shall be assets, for it bears a present value, and is capable of being sold (^g).

So the young of cattle, or the wool of sheep, produced after the testator's death, shall be assets (^h). So if an executor of a lessee for years enter on the lands demised, the profits over and above the rent shall be so regarded (ⁱ).

A trade, generally speaking, is determined by the death of the trader. Articles of partnership in trade subsist not for the benefit of executors of a deceased partner, unless they contain a proviso to that effect (^k): They may contain such proviso: Or the testator may by his will direct his executors to carry on his trade after his death, either with his general assets, or appoint a specific fund to be severed from the general mass of his property for that purpose (^l). Executors may also carry on [167] their trade in their representative character, under the direction of the Court of Chancery (^m). In all these instances, and *a fortiori* in case the executor shall take upon himself to

(^f) Off. Ex. 81.

(^g) Off. Ex. 83. Vid. 2 Fonbl. 371. note (k).

(^h) Off. Ex. 83.

(ⁱ) Com. Dig. Assets. C. Buckley *v.* Pirk, 1 Salk. 79. Vid. Off. Ex. 84, 85. and supr. 143.

(^j) Pearce *v.* Chamberlain, 2 Vez. 33.

(^l) Ex parte Garland, 10 Ves. jun. 110.

(^m) Pearce *v.* Chamberlain, 2 Vez. 33.

Barker *v.* Parker, 1 Term Rep. 295. Vid. Off. Ex. 83. and 3 Bro. C. C. 552.

carry on the testator's trade, the profits of such trade shall be assets for which he shall be accountable. [1]

An executor may also take under the description of an assignee.

Assignees are such persons as the party, who has a power of assignment, actually assigns to receive the chattel; as if A contract to deliver a horse on a given day to B or his assigns, then if B appoint J. S. to receive the horse, J. S. is an assignee in deed (a).

But an executor is an assignee in law, because by law he is the representative of the testator, and is entitled to all his goods and chattels, and the benefit of all personal contracts entered into with him; and therefore, in the case just mentioned, if B die before the day limited for the delivery of the horse, it ought to be delivered to his executor; for by law he is the assignee of B for such a purpose (b).

So, if a legacy is bequeathed to A and his assigns, and A die before payment, it shall go to his executor or administrator, as [168] assignee (p). So, if A be bound to deliver a true rental to J. S. or his assignee at the end of twenty years, and he die before that time has elapsed, A is bound to deliver a true rental to his executor, for he is assignee in point of law (q). So, if A be bound to abide by the award of two arbitrators, and they award that he shall pay to B or his assigns two hundred pounds

(a) *Plowd.* 288.

(p) 11 *Vin. Abr.* 156.

(b) *Ibid.*

(q) 11 *Vin. Abr.* 156. *Fryer v. Gildridge*, Hob. 10.

[1] And if the capital stock be lessened by consequence of a commercial adventure, the administrator shall be liable for the loss. *Callaghan v. Hall*, 1 Serg. & R. 241.

If an executor or administrator compound debts or mortgages, and buy them in for less than is due upon them, although he do it with his own money, he is not to have the advantage to himself. *Dawes v. Boylston*, 9 Mass. T. R. 337.

And where the assignees of a bankrupt, after his decease, assigned *chooses in action*, and other personal estate of the bankrupt, to his executor, for his own use and benefit, he having paid a consideration therefor out of his own money, he was nevertheless held accountable for the same to the creditors and legatees of the bankrupt. *Dawes v. Boylston*, 9 Mass. T. R. 337.

before a day limited for that purpose, and **B** die before the day, the money shall be paid to his executor or assignee^(r). Or, if **A** covenant to grant a lease to **J. S.** and his assigns by Christmas, and **J. S.** die before that time, and before the grant of the lease, it must be made to his executors as his assigns^(s). So, if a lessor covenant to build a new house for the lessee and his assigns, the executor of the lessee shall have the benefit of the covenant as assignee^(t). But where a bond was conditioned for the obligor's paying twenty pounds to such person as the obligee should by his will appoint, and he nominated **J. S.** his executor, but made no other appointment, it was resolved, that the executor should not have the twenty pounds, for he is only an assignee in law, and takes to the use of the testator, but that in that case the condition was in favour of an actual assignee, who takes to his own use^(u).

[169] So, it has been held, that if **A** be bound to pay ten pounds to the assignee of **B** the obligee, **B**'s executor shall not have the ten pounds : But that if **A** be bound to pay ten pounds to **B** or his assignee, then the executor of **B** shall be entitled, because it was a right vested in the obligee himself^(v).

So, before the provisions of the statute of frauds in regard to estates *pur autre vie*^(w), if a lease were granted to **A** and his assigns during the life of **B**, it could go only to **A**'s assignee in deed, and not to his executors^(x). And, on his failure to appoint such assignee, it was, in case of his death, open to be appropriated by the first occupant that could enter upon it during the life of *cestui que vie*.

But where on a fine the use of land was limited to **A** for eighty years, with a power to **A** and his assigns to make leases for three lives, to commence after the expiration of the term : **A** assigned over to **B** ; **B** died, having made his will and appointed **C** his executor : **C** assigned over to **D** ; and **D**, in pursuance of the power, made a lease for life : The question was,

(r) 11 Vin. Abr. 157. 1 Leon. 316.

Hob. 9. Godb. 192. Harg. Co. Litt. 210.

(s) 11 Vin. Abr. 158. Off. Ex. 101.

note 1.

(t) 11 Vin. Abr. 158. Lat. 261.

(v) 11 Vin. Abr. 161. Godb. 192.

(u) 11 Vin. Abr. 156. Pease *v.* Mead,

(w) Vid. supr. 140.

(x) 11 Vin. Abr. 158. Off. Ex. 101.

whether D was such an assignee of A as to have a power to make this lease, or whether it should extend only to the immediate assignees of A ; a point the more doubtful, as there had been a descent on an executor. On its being objected, that [170] an executor should not in some cases be said to be a special assignee, the court seemed inclined to the contrary ; and that D should be considered as an assignee for the purpose of making the leases in question, as well as any person that should come to the estate under the first lessee, though there should be twenty mesne assignments ; and on a subsequent day, judgment was given accordingly (y).

An executor may also be entitled in respect of limitation. A contingent or executory interest, whether in real or personal estate, is transmissible to the representative of the devisee when such devisee dies before the contingency happens, and, if not before disposed of, will vest in such representative when the contingency takes place. Thus where the testator, in case his wife should die without issue by him, after her decease, which was taken to mean immediately after her decease, gave eighty pounds to his brother ; and after the testator's death the brother died in the lifetime of the widow, and she afterwards died without leaving any issue : It was held that the possibility devolved to the executors of the brother, although he died before the contingency happened ; and the legacy was decreed accordingly, with interest from the widow's death (z). So where B, in consideration of natural love and affection for her niece, and to secure to her separate use her personal estate to trustees, in [171] trust for herself during her life, and after her decease, and payment of her debts and funeral expenses, in trust for the sole and separate use of her niece alone, and not for her husband, or for such person as she should appoint, and the niece died in the lifetime of B : It was decided that the contingent interest belonged to the representative of the niece (a). And in like manner, where legacies were bequeathed to children, to be transferred to them at their respective ages of twenty-one years,

(y) Harg. Co. Litt. 210. note 1. Howe v. Whitebanck, 1 Freem. 476. 11 Vin. Abr. 158.

(z) Pinbury v. Elkin, 1 P. Wms. 563. Fearne's Conting. Rem. 444.

(a) Peck v. Parrot, 1 Vez. 236.

or days of marriage, and that in case any of them should die under that age, or marry without consent, his or her share should go to others at their age of twenty-one years, Lord Hardwicke C. decreed that a share accruing by the forfeiture of a child's marrying without consent vested in another child who attained twenty-one, but died before such forfeiture, so as to entitle the personal representative of such deceased child to an equal share thereof with the other surviving children (^b).

If a legacy out of the personal estate is bequeathed to A, to be paid *when* he is of the age of twenty-one years, and he dies before that time, his executors are entitled to the legacy; immediately, if it be payable with interest; if not, when A would have come of age (^c). But if such legacy be bequeathed to A *at* his age of twenty-one merely, or *if* he shall attain the age of [172] twenty-one, and he die before that period, his executors have no title (^d).

This distinction with respect to interests arising out of personal property, as far at least as they are of a *legatory* nature, although it be explained, and in some degree corrected by the more modern cases, is in substance established by a series of authorities (^e); but although the legacy out of the personal property be left to A *at* twenty-one, yet if interest is given before the time of payment, that circumstance is held to be evidence of an intention to vest the legacy (^f). But such presumption does not appear to be formed from that circumstance in

(^b) Chauncy v. Graydon, 2 Atk. 616.

(^c) 11 Vin. Abr. 160. Brown v. Farnell, Carth. 52. Com. Dig. Chan. 3 Y. 8 Chan. R. 112. Cloberie's Case, 2 Ventr. 342. Lord Pawlet's Case, 366. Anon. 2 Vern. 199.

(^d) Com. Dig. Chan. 3 Y. 8. Cloberie's Case, 2 Ventr. 342. Hutchins v. Foy, Com. Rep. 2d ed. 719.

(^e) 2 P. Wms. 612. Mr. Cox's note 1. Lampen v. Clowbery, 2 Ch. Ca. 155. Smell v. Dee, 2 Salk. 415. 1 Eq. Ca. Ab. 295. Barlow v. Grant, 1 Vern. 255. Stapleton v. Cheales, Prec. Chan. 318. 3 Bro. P. C. 337. 2 Eq. Ca. Abr.

548. Lowther v. Condon, Barnard. 329.

Steadman v. Palling, 3 Atk. 427. Goss v. Nelson, 1 Burr. 227. Barnes v. Allen, 1 Bro. Ch. Rep. 181. Monkhouse v. Holme, ib. 298. Benyon v. Maddison, 2 Bro. Ch. Rep. 75. May v. Wood, 3 Bro. Ch. Rep. 471.

(^f) 2 P. Wms. 612. note 1. Collins v. Metcalfe, 1 Vern. 462. Stapleton v. Cheele, 2 Vern. 673. S. C. Prec. Ch. 318. Atkins v. Hiccocks, 1 Atk. 501. Van v. Clark, 1 Atk. 512. Neale v. Willis, Barnard. 43. Foncrean v. Foncrean, 3 Atk. 645. S. C. 1 Vez. 118. Walcot v. Hall, 2 Bro. Ch. Rep. 305.

respect to any interests but those of a legatory nature, although the fund be merely personal: for it hath not been admitted, in cases of portions for younger children, to be raised out of such fund at twenty-one, with interest in the meantime for maintenance and education (^g).

So with respect to all interests arising out of land, the rules [173] on the subject are totally different: for whether the land be the primary or auxiliary fund, whether the charge be made by deed or will, as a portion or a general legacy for a child or a stranger, with or without interest, the general rule is, that charges on land payable on a future day, shall not be raised where the party dies before the day of payment (^h). This rule however is subject to many exceptions; as, where the time of payment is postponed from the circumstances, not of the person, but of the fund. As, where a term was created for daughters' portions, commencing after the death of the father and mother, on trust to raise the portions from and after the commencement of the term, and the father died leaving a daughter, the portion was decreed to be vested, but not raisable during the life of the mother (ⁱ).

(g) 2 P. Wms. 612. note 1. Targus *v.* Puget, 2 Vez. 207. Hubert *v.* Parsons, ib. 262. Goss *v.* Nelson, 1 Burr. 227.

(h) Pitfield's Case, 2 P. Wms. 515. 612. note 1. Lampen *v.* Clowbery, 2 Ch. Ca. 155. Poulet *v.* Poulet, 1 Vern. 204. S21. Smith *v.* Smith, 2 Vern. 92. Yates *v.* Phittiplace, ib. 416. Carter *v.* Bletsoe, Prec. Ch. 267. Tournay *v.* Tournay, ib. 290. Stapleton *v.* Cheales, ib. 318. Jennings *v.* Looks, 2 P. Wms. 276. Anon. Mosel. 68. Neeve *v.* Kecke, 9 Mod. 106. Gordon *v.* Raynes, 3 P. Wms. 134. Bradley *v.* Powell, Ca. Temp. Talb. 193. Prowse *v.* Abingdon, 1 Atk. 482. Hall *v.* Terry, ib. 502. Van *v.* Clark, ib. 512. Boycot *v.* Cotton, ib. 555. Richardson *v.* Greese, 3 Atk. 69. Attorney-General *v.* Milner, ib. 112. Oldfield *v.* Oldfield, 1 Bro. Ch. Rep. 106. in note.

124. in note. Ashburne *v.* M'Guire, 2 Bro. Ch. Rep. 108: 2 Yeates, 369. 5 Binn. 118. 3 Yeates, 34.

(i) 2 P. Wms. 612. note 1. Lowther *v.* Condon, 2 Atk. 127. 130. S. C. Barnard. 327. Emes *v.* Hancock, 2 Atk. 507. Butler *v.* Duncomb, 1 P. Wms. 457. Pitfield's Case, 2 P. Wms. 513. Ca. Temp. Talb. 117. King *v.* Withers, 3 P. Wms. 414. Sherman *v.* Collins, 3 Atk. 319. Hutchins *v.* Fitzwater, Com. Rep. 716. Hodgson *v.* Rawson, 1 Vez. 44. Dawson *v.* Killet, 1 Bro. Ch. Rep. 119. 124. in note. Tunstal *v.* Bracken, Amb. 167. Embrey *v.* Martin, ib. 230. Smith *v.* Partridge, ib. 266. Mannerling *v.* Herbert, ib. 575. Fawsey *v.* Edgar, 1 Bro. Ch. Rep. in note. Thomson *v.* Dowe, ib. 193. in note.

In respect to those cases where portions have been given out of land, and no time of payment expressed, it seems difficult to reconcile the determinations. According to one class, their interest is vested immediately, and transmissible: according to [174] another, such portions shall not vest, if the children die before they want them (^k).

But if lands be devised for payment of portions, and one of the children entitled to a portion die after it becomes due, though before the lands are sold, the personal representative of such child will clearly be entitled to the money (^l).

In those cases, in which both the real and personal estates are charged with a legacy, as far as the executor claims out of the latter he shall succeed according to the rule of the spiritual court where such claim is determinable, though the infant legatee die before the time of payment, and consequently the legacy, so far as it is charged upon the land, shall sink (^m).

An executor may also claim by election; as where the testator at the time of his death was entitled out of several chattels to take his choice of one or more to his own use. If nothing passes to the grantee of a chattel before his election, it ought to be made in his lifetime (ⁿ). As if A give to B such of his horses as B and C shall choose, the election ought to be made in the lifetime of B (^o). But where an interest vests immediately by the grant, the election may be made by the executor, as well as by the party himself (^p). As, if a fine be levied of a hundred acres, and the conusee grant fifty to the conusor for a term of years, his executor may choose which fifty he will have. So if A gives one of his horses to B and C, B may elect

(^k) Cowper *v.* Scott, 3 P. Wms. 119. Wilson *v.* Spencer, ib. 172 2 P. Wms. 612. note 1. Brewin *v.* Brewin, Prec. Ch. 195. Warr *v.* Warr, ib. 213. Ld. Teynham *v.* Webb, 2 Vez. 209. 1 Bro. Ch. Rep. 124. in note. Lord Hinchingbroke *v.* Seymour, ib. 395. and vid. 2 Atk. 133. and 11 Vin. Abr. 163, 164. Whitmore *v.* Wild, 1 Vern. 326. 347. Gifford *v.* Goldsey, 2 Vern. 35. Earl Rivers *v.* Earl Derby, ib. 72.

(^l) 11 Vin. Abr. 163. Bartholomew *v.* Meredith, 1 Vern. 276.

(^m) Duke of Chandos *v.* Talbot, 2 P. Wms. 613.

(ⁿ) Com. Dig. Election B. Harg. Co. Litt. 145.

(^o) 1 Roll. Abr. 726.

(^p) Harg. Co. Litt. 145.

after the death of C, which he will take, for an interest vested [175] in them immediately by the gift^(q). So if the election determine only the manner or degree in which the thing shall be taken, the executor, as well as the grantee himself, may make it; for in such case also there is an immediate interest^(r). As, if a lease be granted to A for ten or twenty years, as he shall elect, the executor is entitled to the election.

(q) 1 Roll. Abr. 725.

(r) Harg. Co. Litt. 144 b.

[176] CHAP. IV.

OF CHATTEL INTERESTS WHICH DO NOT VEST IN THE EXECUTOR OR ADMINISTRATOR.

SECT. I.

Of chattels real which go to the heir; and also touching money considered as land, and land as money.

I PROCEED now to inquire under what special circumstances chattel interests shall go to the heir of the last proprietor.

The principle which generally pervades the cases in which the heir, as distinguished from the executor, shall be entitled to chattels, is this—that they are so annexed to and consolidated with the inheritance, that they shall accompany it wherever it vests (^a).

And, first in regard to chattels real : If A seised in fee grant an estate tail, or a lease for life or years, reserving rent, such rent as accrues after his death, being incident to the reversion, shall go to his heir, and not to his executors (^b), although they are expressly named in the covenant (^c). If A seised in fee make a lease, reserving rent to him, his executors and assigns, [177] and die, the rent is determined, for the executors are not entitled to it, inasmuch as they are strangers to the reversion, which is an inheritance, nor shall it go to the heir, because he is not named (^d). But if A seised in fee make a lease for years, reserving rent to him and his assigns, or to him, his executors and assigns, during the term, although there be decisions to the contrary (^e), the words, “during the term,” shall be sufficient to carry the rent to the heir. Where the rent is so re-

(^a) 2 Bl. Com. 427, 428.

(^d) Harg. Co. Litt. 47. 2 Roll. Abr.

(^b) 3 Bac. Abr. 62. Harg. Co. Litt. 47.
2 John. Cas. 24.

450. Sacheverel v. Frogate, 1 Ventr. 161.

(^c) Harg. Co. Litt. 47. note 9. Drake
v. Munday, Cro. Car. 207.

(^e) See Noy. 96. 12 Co. 36. Richmond
v. Butcher, Cro. Eliz. 217. 3 Bac.
Abr. 63. in note.

served, the intention of the parties is clearly expressed, that the lessee is to pay the same during the continuance of the demise (f).

In case the lease reserve rent at Michaelmas, or ten days after; if the rent be not paid at Michaelmas, and, before the ten days are expired, the lessor dies, his heir, and not his executor, shall receive the rent: for although it were in the election of the lessee to pay it at Michaelmas, yet the ten days after are the true legal term, and consequently the rent was not legally due before that period of time, and therefore is no chattel (g). So if the lessor die on the day on which the rent is payable, after sunset, and before midnight, the heir, and not the executor, may demand the rent, for it is not in strictness due till the last minute of the natural day, although it [178] may be more convenient to pay it before (h). So where rent is granted to A and his heirs for life, and the lives of B and C, the heir shall have the rent as a party specially nominated, and as heir by descent (i). So, although, for the arrears of a *nomine pœnae*, or penalty for non-payment of rent, the grantee himself, and therefore his executors, may have an action of debt, yet such penalty, as an incident to the rent, shall descend to the heir (k). So a term for years in trust to pay debts, afterwards to attend the inheritance, shall go to the heir, and not to the executor (l). So if a term be raised for a certain purpose, and that purpose be answered, the heir shall have the beneficial interest in the same, whether it be so expressed or not (m); but he shall take it as a term, and consequently as a chattel (n). So an annuity, although a chattel interest, is descendible to the

(f) Harg. Co. Litt. 47. note 8. ibid. 202. 3 Bac. Abr. 62. Sacheverel *v.* Frogate, 2 Saund. 367. S.C. 1 Vent. 148. 161. Sacheverel *v.* Frogate, Raym. 213. 2 Lev. 13. S.C.

(g) 3 Bac. Abr. 63. 10 Co. 127.

(h) 3 Bac. Abr. 63. Harg. Co. Litt. 202. note 1. Dupper *v.* Mayo, 1 Saund. 287. Ld. Rockingham *v.* Oxenden, Salk. 578. and vid. 1 P. Wms. 177. S.C.

(i) 11 Vin. Abr. 168. Bowles *v.* Poore, Cro. Jac. 282. Vid. 2 Bl. Com. 259.

(k) 11 Vin. Abr. 168. Harg. Co. Litt.

162 b.

(l) 11 Vin. Abr. 172. Countess of Bristol *v.* Hungerford, 2 Vern. 645. Com. Dig. Biens. B. 2 Ca. Ch. — *v.* Langton, 156. 160.

(m) 11 Vin. Abr. 169. Anon. 2 Vent. 359.

(n) 11 Vin. Abr. 171. Levet *v.* Needham, 2 Vern. 139.

heir^(o). So where A, the *cestuy que trust* of a term in Black-acre, afterwards purchased the fee in his own name, and devised Blackacre in fee to B, his heir, whom he made his executor and residuary legatee, it was held that on the death of B the term should go with the fee to B's heir, and not to his personal [179] representative^(p). So if an estate *pur autre vie* be limited to A, his heirs, executors, administrators, and assigns, and be not devised, it shall descend to the heir as a special occupant^(q).

But if a debt be owing to A, and, in satisfaction of it, the debtor grants him an annuity, charged on lands for the grantor's own life, and redeemable, such annuity shall be part of A's personal estate^(r). So a term conveyed as a fee by lease and release to J. S. and his heirs by the word "grant," although it cannot operate as a fee to vest in the heirs of J. S. yet shall go to his personal representative^(s). So if a lessee for twenty years make a lease for ten years, reserving a rent during the last-mentioned term to him and his heirs, it shall be void as to his heir, and shall belong to his executors^(t). So if A possessed of a term for years devise it to B for life, remainder to the heirs of B, it seems that on B's death it shall go to his executor, and not to his heir^(u). So if A seised in fee make a lease for years, reserving rent, and devise the rent to B; B's executor, and not his heir, shall be entitled to the rent, because B had no more than a chattel interest^(v). So where a copy-[180] hold estate was granted to A for the lives of A, B, and C, and A died intestate, it was held that his administrator should have the estate during the lives of B and C^(w).

So a lease granted by a copyholder for one year *only* shall

(o) 11 Vin. Abr. 153. Arg. 10. Mod. 237. Vide also 11 Vin. Abr. 146. pl. 25. Co. Litt. 374 b. Earl Stafford *v.* Buckley, 2 Vez. 170. Countess of Holderness *v.* Marq. of Carmarthen, 1 Bro. C. Rep. 377. 2 Bl. Com. 40.

(p) Goodright *v.* Sales, 2 Wils. 329. vid. supr. 7.

(q) Atkinson, adm'x. *v.* Baker, 4 Term Rep. 229. Vid. supr. 140.

(r) Com. Dig. Biens. C. Longuet *v.*

Scawen, 1 Vez. 402.

(s) 11 Vin. Abr. 153. Marshall *v.* Frank, Chan. Prec. 480.

(t) Sacheverel *v.* Frogate, 1 Vent. 161.

(u) 11 Vin. Abr. 155. Davis *v.* Gibbs, 3 P. Wms. 29.

(v) 11 Vin. Abr. 145. Dyer 5. b. note 1. ibid. Ards *v.* Watkin, Cro. Eliz. 637. 651. Moore, 549. S. C.

(w) 11 Vin. Abr. 151. in note. Howe *v.* Howe, 1 Vern. 415.

be no forfeiture, for it is warranted by the general custom of the realm, and shall be accounted assets in the hands of the executor of the lessee (^x).

If A grant a rent in fee to J. S. with a proviso that, if it be in arrear, the grantee may enter the lands, and retain till he be satisfied; the power of entry is an inheritance, and descends to the heir: but when entry is made, the party has merely a chattel interest in the lands, which, with the arrears, shall go to his executor (^y).

If the grantee of a rent in fee take a lease for years of the lands out of which the rent issues, and die, his executor shall have the land, and the heir is precluded from the rent (^z).

So, a bond given by one parcener to pay the other, her executors or administrators, an annual sum during the life of J. S. [181] for owlty of partition, or as a compensation for her share being of the less value, shall go to the executor, and not to the heir: because in such case there is no grant of a rent, but a mere contract, and therefore the obligor had an election, either to pay the same, or to forfeit her bond (^a).

Money covenanted to be laid out in land, we have seen (^b), shall descend to the heir. Nor is the case varied by the covenants being voluntary; as, if A without any consideration covenant to lay out money in a purchase of land to be settled on him and his heirs, a court of equity will compel the execution of such contract, though merely voluntary; for in all cases where it is a measuring cast between an executor and an heir, the latter shall in equity have the preference (^c). But in such cases, if there be proof that the party, absolutely and in all events entitled to the money, intended to give it the quality of a personal estate, then it shall go to his executor. Whether the mere circumstance of the fund remaining in his hands in the shape of money shall of itself be evidence of such intention, and

(^x) 11 Vin. Abr. 146. Poph. 188.
Harg. Co. Litt. 59. note 4. 4 Co. 26.
9 Co. 75 b; Matthews v. Weston, W.
Jo. 249. Litt. Rep. 233.

(^y) 11 Vin. Abr. 147. Jemmot v. Coo-
ly, 1 Lev. 171. Errington v. Hirst,
Raym. 125. 158. 1 Sid. 223. 262. 344.

(^z) 11 Vin. Abr. 147. Lit. Rep. 59.

(^a) 11 Vin. Abr. 150. Hulbert v. Hart,
1 Vern. 133.

(^b) Supr. 8.

(^c) Edwards v. Countess of Warwick,
2 P. Wms. 176.

if not, whether the heir has any equity against the personal representative in this respect, are points in which the cases seem in some measure to differ. But they all agree that even slender proof of the intention will decide the question (^d).

Thus, by articles before marriage, securities for moneys amounting to the sum of 1,400*l.* were assigned to trustees, and agreed to be invested in land to be settled on the husband for life, remainder to the wife for life, remainder to the issue of the marriage, remainder to the right heirs of the husband, some of the securities were continued unaltered, but part of the money settled was invested on other securities expressly in trust for the husband, his executors and administrators. The husband died without issue, having made his will, by which he devised some of his lands to his wife, and the rest of his real estate in Yorkshire and elsewhere to J. S. and all his personal estate and all his securities for money to his wife, whom he appointed executrix. It was held, that so much of the 1,400*l.* as was subsisting upon the securities on which it was originally placed, or on any other securities where no new trust had been declared, ought to be considered as real estate; but that such part as was called in by the testator, and afterwards placed out upon securities upon a different trust, should be taken to be personal estate; upon the principle, that as there was no issue of the marriage, it was in the power of the husband to alter and dispose of the settled property as against the heir at law, though not against the wife, and yet the placing it out upon different trusts was an alteration of the nature of it, and his declaring the trust to his executors seemed equivalent to his declaring that it should not go to his heir (^e).

But where A executed articles of agreement for the purchase of land of B, and paid B six hundred pounds; but B paid A interest for the money, and A paid B rent for the premises, it was held, that on A's dying before the conveyance, his executor was

(^d) *Edwards v. Countess of Warwick*, 2 P. Wms. 175. and note 1. *Chichester v. Bickerstaff*, 2 Vern. 295. *Lingen v. Sowray*, 1 P. Wms. 172. *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211. S. C. Ca. Temp. Talb. 80. *Guidot v. Guidot*,

8 Atk. 254. ib. *Crabtree v. Bramble*, 680. 5 Bro. P. C. 269. *Bradish v. Gee*, Ambl. 229. *Hewitt v. Wright*. 1 Bro. Ch. Rep. 86. *Pulkney v. Earl Darlington*, 223.

(^e) *Lingen v. Sowray*, 1 P. Wms. 172.

[182] entitled to the six hundred pounds, as part of his personal estate^(f). On the other hand, where A died intestate, leaving two daughters, and after his decease the widow laid out the sum of four hundred pounds, part of his assets, in land, and settled it to herself for life, remainder to her two daughters in tail, remainder to her own right heirs: the administrators of the daughters claimed from the heir at law of the widow two-thirds as personal estate, and it was proved that the same four hundred pounds were applied in the purchase: although the Master of the Rolls decreed for the administrators, yet on appeal the Lord Keeper reversed the decree, on the ground, that money could not be specifically distinguished, nor followed, when invested in a purchase^(g). But where an executor in trust for an infant of a lease for ninety-nine years determinable on three lives, on the lord's refusal to renew but for lives absolutely, complied with his requisition, and changed the years into lives; on the infant's dying under twenty-one, this was held to be a trust for his administrator, and not for his heir^(h). So where trustees purchased lands in fee simple with the infant's money, and the infant died in his minority, it was held that the land should be accounted part of the personal estate, and should go to his administrator⁽ⁱ⁾. So, where committees of a [183] lunatic invested part of his personal estate in the purchase of lands in fee, the court declared it should be deemed personal property, decreed an account, the land to be sold, and the money to be divided among the next of kin: For it shall not be in the power of a guardian or trustee to change the nature of the estate. But it appears, that if in such case the trustees obtain a decree in equity for the purchase, the court will maintain its decree, and then the estate shall go to the heir, and not return to the personal fund, if there be no ground to impeach the trustees of fraud^(k).

With respect to mortgages, since courts of equity consider such contracts as merely personal, the mortgage money is in

^(f) 11 Vin. Abr. 149. 2 Chan. Rep. 138.

^(g) 11 Vin. Abr. 153. *Kendar v. Milward*, 2 Vern. 440.

^(h) 11 Vin. Abr. 155. *Witter v. Witter*, 3 P. Wms. 99.

⁽ⁱ⁾ 11 Vin. Abr. 151. 2 Chan. Rep. 377.

^(k) 11 Vin. Abr. 51. *Audley v. Audley*, 2 Vern. 192. *Thomas v. Kemish*, 2 Freem. 209. *Earl of Winchelsea v. Norcliffe*, 1 Vern. 435.

general held to be part of the personal estate, and to belong to the executor of the mortgagee. But, under special circumstances, it shall be regarded in the light of real property, and shall go to the heir⁽¹⁾.

At law, if the condition or defeasance of a mortgage of inheritance make no mention either of heirs or executors, to whom the money shall be paid, the money ought to go to the executors, for, being originally derived out of the personal estate, in natural justice it ought to return thither. If the defeasance appoint the money to be paid either to the heir or executors, and the mortgagor pay the money at or before the day, he may elect [184] to pay it either to the heir or the executor. If the day of payment be past, and the mortgage be forfeited, all election is gone; for at law there exists no right of redemption. There can be a redemption only in equity, and equity will not revive the election; but considers the case the same as if neither heir nor executor had been named. And as in that case the law will give it to the executor; equity, which ought to follow the law, will decree it to the same person. Hence, therefore, when the security descends to the heir of the mortgagee attended with an equity of redemption, as soon as the mortgagor pays the money, the land shall belong to him, and the money only to the mortgagee, which is merely personal, and so accrues, and is payable to his executor^(m). Nor will it appear inequitable that the heir should be decreed to make a reconveyance without having the money which comes in lieu of the land, if it be considered that the land was no more than a security, and that, after payment of the money, a trust results for the mortgagor, which the heir of the mortgagee is bound to execute.

Nor is it material that the executor of the mortgagee has assets without such money. Assets shall not be the measure of justice between the parties. The heir either ought to have the money if there were no assets, or ought not to have it although there were. Nor is the principle varied by there being no personal covenant on the part of the mortgagor to pay the money; for although the claim of the mortgagee's executor

(1) Powell on Mortgages, 2d vol. 682
—698.

(m) Waring v. Danvers, 1 P. Wms. 295.
See also Fonbl. 255.

would be strengthened by such a covenant, yet it shall avail him without it⁽ⁿ⁾. And although a mortgage in fee be conditioned that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns, and the mortgagee die before the forfeiture of the mortgage, whereby the mortgagor has his election at law to pay the money to either, yet in equity it shall belong to the executor; for, in mortgages in fee, the mortgagee's heirs are trustees for his personal representatives^(o). In short, mortgages are deemed in equity to be mere chattel interests, and to belong to the executor of the mortgagee, unless his intention to the contrary be declared in express terms by the contract^(p), or by his will, or be evidently implied by his conduct: As, if he foreclose, or procure a release of the equity of redemption, and obtain actual possession of the premises. So, where a mortgage in fee descended on the heir at law of the mortgagee, and the personal representative of the mortgagee, ten years after the money had been paid to such heir, filed a bill for the same, it was decreed to him, but without interest^(q).

Nor shall a legacy to the executor, although expressed to be payable after debts, and the other legacies, affect his title to [186] money due to the testator on mortgage. Thus, where a mortgagee in fee, after bequeathing several legacies, gave one hundred pounds to his executor, with a direction that his legacy should not be paid till the testator's debts and other legacies were discharged, and there was no deficiency of assets, yet the court decreed in favour of the executor against the heir^(r). So, if the mortgagor shall fail to redeem, the heir of the mortgagee shall convey the land to the executor: As where the mortgage was forfeited, though the heir of the mortgagee were in possession by descent, and there were no deficiency of assets, on the mortgagor's not offering to redeem, the heir of the mortgagee was decreed to make such conveyance: for since the money,

(n) 11 Vin. Abr. 148. and in note. Baker v. Baker, 2 Freem. 143. See also 2 P. Wms. 455.

(o) Sir Thomas Littleton's Case, 2 Ventr. 351. Barnard. 50. Rightson v. Overton, 2 Freem. 20. Harg. Co.

Litt. 208 b. note 1.

(p) Off. Ex. Suppl. 47. Harg. Co. Litt. 210.

(q) Turner's Case, 2 Ventr. 348.

(r) Canning v. Hicks, 2 Ca. Cha. 187. S. C. 1 Vern. 412.

as part of the personal estate, would have gone to the executor, he was held entitled to the land as a recompense^(q). So, where a copyhold was mortgaged by surrender to A, who was admitted tenant, and died, leaving B his son, and heir, and executor; B entered, and was also admitted, and afterwards by his will, but without any surrender to the use of the same, devised it to C: on B's death, C became the personal representative of A, and exhibited his bill against D, who was heir at law of A and B, and who claimed this as a real estate on a variety of grounds: that the forfeiture had been so long incurred; that two descents had been cast; that more was due on the estate than its value; that the mortgagor had by his answer refused to redeem; and [187] submitted to be foreclosed; and that the devise by B to the plaintiff was void at law for want of a surrender to the use of the will: Yet it was decreed to C, as the personal representative of A, inasmuch as there was no foreclosure, nor release of the equity of redemption in the lifetime of the mortgagee; and on appeal the decree was affirmed^(r).

If on a mortgage being forfeited, the mortgagor release to the heir of the mortgagee in fee, yet the executor of the mortgagee shall have the benefit of the estate, although there be no debts. So, in the case of a foreclosure of a mortgage, or that the mortgage be of so ancient a date, as in the ordinary course of the court it is not redeemable, it shall belong to the personal representative of the mortgagee; for unless the mortgagee were actually in possession, it shall be considered as personal estate^(s). So, where a wife had a mortgage in fee of a copyhold, and died leaving issue, and the issue was admitted, and died, and then the husband, as administrator to his wife, claimed the copyhold as a mortgage, and consequently part of the wife's personal estate; it was decreed to him against the heir at law, although the latter had been admitted^(t). So, a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divisible according to the custom^(u).

(q) *Ellis v. Guavas*, 2 Chan. Ca. 50.
Canning v. Hicks, 187.

(r) *Tredway v. Fotherley*, 2 Vern. 367.
1 Eq. Ca. Abr. 273. 328. vid. *Awdley v. Awdley*, 2 Vern. 193.

(s) *Awdley v. Awdley*, 2 Vern. 193.

(t) *Turner v. Crane*, 1 Vern. 170.

(u) *Thornborough v. Baker*, 1 Chan. Ca. 285. *Winn v. Littleton*, 1 Vern. 4.

[188] But if the possessor of the estate conceive himself to hold it in fee, his interest will not be considered as personal against his evident intention; as if an absolute sale of an estate in mortgage be fraudulently made by the mortgagee to a third person, the purchase money, on its being refunded by the vendor after the death of the vendee, will go to his heir; for the intention of the vendee was to alter the nature of his property, and to invest the money in the purchase of land, and therefore the court will consider it as real property (^x). So, if it appear to be the intention of the mortgagee that the mortgage should pass by devise as a real estate, the executor will not be entitled (^y). As, where the testator had several mortgages, and among the rest a mortgage in fee of lands in Whiteacre, and devised his mortgages to his two daughters, their executors and administrators, and his lands in Whiteacre, on which he had entered on forfeiture of the mortgage, to them and their heirs: M, one of the daughters, died without issue; H, her husband and administrator, claimed a moiety of the lands in Whiteacre as a mortgage not foreclosed, nor of which the equity of redemption was released, and therefore part of his wife's personal estate; but it was held, that although it were a mortgage, as between a mortgagor and mortgagee, and therefore personalty; yet the testator's intention was, that it should pass to his daughters as a real estate to them and their heirs, and that inasmuch as M was dead without issue, it descended to her sisters as her [189] heirs at law, and that H was entitled to no part of the same in the nature of personal estate (^z). But where a mortgage was devised as real estate after a decree of foreclosure *nisi*, that is, unless cause were shown to the contrary, it was held to be personal estate for payment of debts, if the assets were insufficient, although considered as real estate between the devisor and devisee (^a). A mortgage will not pass as land under a general description applicable to it in point of locality, if from other circumstances it be evident that the owner regarded it as personal property (^b).

(^x) *Cotton v. Iles*, 1 Vern. 271.

(^y) *Martin v. Mowlin*, 2 Burr. 969.

(^z) *Noys v. Mordant*, 2 Vern. 581. S.

C. Gilb. Rep. in Chan. 2. S. C. Chan. Prec. 265.

(^a) *Garret v. Evers*, Moseley, 364. and

see *Silberschildt v. Schiott*, 3 Ves. &

Bea. 45.

(^b) *Martin v. Mowlin*, 2 Barr. 969.

Where money secured by mortgage, to which the executor was entitled at law, was articed to be laid out in land, and settled on the issue of the marriage, on special verdict it was adjudged to be bound by the articles^(c). And it has been held, that the heir of a mortgagee in fee, if he pay the executor the mortgage money, may take the benefit of a foreclosure to himself^(d).

If the parson of a church be seised of the advowson in fee, and die, in such case the heir, and not the executor, shall present; because at the same time the avoidance rests in the executor, the inheritance descends to the heir; and where two titles concur in an instant of time, the elder shall be preferred^(e). [190] But if A be seised of an advowson in gross, or in fee appendant to a manor, and an avoidance happen in his lifetime, his executor, and not his heir, shall present, inasmuch as it was a chattel vested, and severed from the manor^(f). But if the next presentation be granted to A, his heirs and assigns, it is clearly a mere chattel, notwithstanding the word "heirs:" It is but one turn, and where the thing is a chattel, the word "heirs" cannot make it an inheritance^(g). So, if a man grant the two next presentations of a church, they are chattels, and if the grantee die, the executor shall have them, and not the heir^(h).

If a party having the inheritance of tithes die after the tithes are set out, they shall go to his executor, and not to his heir⁽ⁱ⁾.

The interest denominated the year, day, and waste, which has been already explained^(k), is but a chattel; and although granted by the crown to A and his heirs, shall go to his executors^(l).

In regard to the estate of a lunatic, the Court of Chancery will change the nature of the property so as to alter the succession, if the interest of the owner, which is solely con-

(c) *Vid. Lechmere v. Earl of Carlisle*, 3 P. Wms. 217.

(d) *Clarkson v. Bowyer*, 2 Vern. 67.

(e) 11 Vin. Abr. 169. 3 Bac. Abr. 61.
Holt v. Bishop of Winchester, 3 Lev. 47. 3 Salk. 280. S. C.

(f) 11 Vin. Abr. 145. Fitzh. N. B. 33.

(g) 11 Vin. Abr. 173. Br. Chattels. pl. 6.

(h) 11 Vin. Abr. 173. Br. Chattels. pl. 20.

(i) Com. Dig. Biens. A. 2. Off. Ex. 60. 3 Bac. Abr. 64.

(k) *Vid. supr. 144.*

(l) 11 Vin. Abr. 175. Off. Ex. 54.

sidered, shall require it. Between the real, and personal representatives of a lunatic, there is no equity. They are both volunteers, and must take what they find at his death in the condition in which they find it. Thus the produce of timber on a lunatic's estate, cut and sold by an order of the court, founded on the Master's report that it would be for the benefit of the lunatic, as some of the timber was in a state of decay, and injuring the rest, was on his death held to be personal assets, and incapable of a transmutation for the benefit of the heir^(m).

Charters and deeds, court rolls, and other evidences of the land, as well as the chests in which they are usually kept, shall pass with the land to the heir, and shall not go to the executor⁽ⁿ⁾. So, where a bill was filed in chancery for an antique horn, with an ancient inscription, on the ground that it had immemorially gone with the plaintiff's estate, and been delivered to his ancestors by which to hold the land, the court was of opinion, that if the land were of the tenure called cornage, the heir had a title to this monument of antiquity at law^(o). So, if land be sold by A, on condition, that if the purchase money be not paid by a limited day, then that he shall re-enter; and A die; here, [192] although there be a debt due to the executor, and no land descended to the heir of A, yet the heir shall have the deeds, inasmuch as upon him the condition descended^(p). But if A deliver a charter to B, to redeliver to him, and his heirs, having no title to the land, his executor, and not his heir, shall have this charter, because it was only a chattel without the land^(q).

So, if the writings of an estate are pawned or pledged for money lent, they are considered as chattels in the hands of the creditor, and in case of his decease, they will go to his personal representative, as the party entitled to the benefit accruing from the loan^(r).

^(m) Oxenden *v.* Lord Compton, 2 Ves. jun. 69. 75. note b. 4 Bro. Ch. Rep. 231. 397. S. C. vid. ex parte Marchioness of Annandale, Ambl. 81.

⁽ⁿ⁾ Off. Ex. 63. 3 Bac. Abr. 65. L. of Test. 381. vid. Atkinson, adm'x. *v.* Baker, 4 Term Rep. 229.

^(o) 3 Bac. Abr. 65. Pusey *v.* Pusey, 1 Vern. 273. Harg. Co. Litt. 107.

^(p) Off. Ex. 63.

^(q) 11 Vin. Abr. 145. Fitzh. Detinue. pl. 7.

^(r) 3 Bac. Abr. 65. Noy. Max. 50.

SECT. II.

Of chattels personal which go to the heir: and herein of heir-looks.

WITH respect to chattels personal, and animate, the heir has a qualified possessory property in deer in a park, hares or rabbits in a warren, doves in a dove-house, pheasants and partridges in a mew, swans, though unmarked, in a private moat [193] or pond, or kept in water within a manor, or at large, if marked, and in bees in a hive, or as it has been held by some authorities, though not in a hive, *ratione soli*, in respect of his ownership in the soil. He is, also, entitled to fish in a private pond or piscary. These various animals shall all go with the inheritance, for without them it is incomplete^(a). And such, we may remember, is the property that shall vest in the executor, if the testator had a lease for years in the land^(b).

With regard to chattels personal, and vegetable, not only timber trees, as oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and horn-beam, but also trees of every other description belonging to the soil, and unless severed during the life of the ancestors, are the property of the heir^(c). So, likewise, are all species of fruits, if hanging on the tree at the time of his ancestor's death. Grass, also growing, though ready to be mown for hay, shall descend with the land to the heir; for these are either natural, or permanent profits of the earth^(d). He is also entitled to such hedges and bushes as are standing at that time^(e).

[194] But, as I have already stated^(f), corn, which is raised by yearly cultivation, shall go to the executor, to compensate for the expense and labour of tilling, manuring, and sowing the

(^a) Harg. Co. Litt. 8. Com. Dig. Biens. B. 1 Roll. Abr. 916. Off. Ex. 53. 11 Vin. Abr. 166. 2 Burn. Just. 369. 7 Co. 15 b. 3 Bac. Abr. 64. 2 Bl. Com. 427.

(^b) Harg. Co. Litt. 8. note 10. Vid. supr. 141. 148.

(^c) Com. Dig. Biens. H. 3 Bac. Abr. 64. Off. Ex. 59. Swinb. 934, 935. p. 7. s. 10.

(^d) Swinb. 934, 935. p. 7. s. 10.

(^e) Off Ex. 59. 3 Bac. Abr. 64.

(^f) Supr. 150.

lands, and for the encouragement of husbandry, which is of so public a concern (^g).

The same law, on a similar principle, extends to other emblems, as hops, saffron, hemp, and the like (^h).

It has been asserted by a learned writer (ⁱ), that roots of all kinds, such as parsnips, carrots, turnips, and skirrets, shall go to the heir, since they cannot be taken without digging and breaking the earth, which must of necessity be a detriment to the inheritance. It seems, however, perfectly clear, that these articles, as requiring an annual cultivation, fall within the like reasoning, which the law has adopted in regard to corn, and consequently shall belong to the executor (^k).

But things which produce no annual profit are not comprehended under the name of emblems; therefore, although the testator himself hath sown the land with acorns, or planted it with oaks, alders, elms, or other trees, they shall not be classed [195] as emblems, but shall belong to the heir (^l). So if the testator improved the natural produce, either by trenching, or by sowing hay-seed, such increase shall go to the heir; for the executors have no property in the natural produce, and in such instances that which was artificial cannot be distinguished from it (^m). Wall fruit also, though greatly improved by culture, seems to fall within the same principle and to be the property of the heir. But the executor, we have seen, is entitled to hops, though growing on ancient roots, for they are produced by manurance and industry (ⁿ).

Although timber trees originally belong to the soil, yet, if A, seised in fee, sell the timber trees on his land to B, and B die before they are felled, they shall belong to his executor (^o). So, if a man sell his land, reserving the timber trees, they remain in him by particular contract, as chattels distinct from the soil, and shall go to his executor. For, in both these cases, in con-

(^g) Off. Ex. 59. 3 Bac. Abr. 64.

(^l) 2 Bl. Com. 123. Com. Dig. Biens.

(^b) Ibid.

G. 1. Harg. Co. Litt. 55 b.

(ⁱ) Off. Ex. 62, 63. Vid. also Gilb. L. of Ev. 249.

(^m) Com. Dig. Biens. G. 1. Gilb. L. of Ev. 249. Harg. Co. Litt. 56.

(^k) Harg. Co. Litt. 55 b. 2 Bl. Com. 123.

(ⁿ) Harg. Co. Litt. 55 b. Cro. Car. 515. Vid. supr. 150.

(^o) 3 Bac. Abr. 64. Off. Ex. 59, 60.

struction of law, they are abstracted from the earth, although they are not actually severed by the axe^(p).

But, if a tenant in tail sell the timber trees on his soil, such sale will not be effectual without docking the intail, unless they were actually felled in the lifetime of such tenant, otherwise [196] they will descend with the land to the issue^(q). So, if A lease lands for life, or years, excepting the trees, they continue parcel of the inheritance, so long as they are annexed to the land, and descend with it to the heir. So if a feoffment be made excepting the trees, and the feoffee afterwards buy them, they are re-annexed to, and become part of the inheritance^(r). So, where a lessee for years purchased trees growing on land, and had liberty to cut them within eighty years, and he afterwards bought the inheritance of the land, and died; it was held that the executor should not have the trees, for although they were once chattels, yet by the purchase of the inheritance they were re-united to the land^(s).

Such personal chattels inanimate, as go to the heir with the inheritance, and not to the executor, are, for the most part, denominated heir-looms. The termination loom, in the Saxon language, signifies a limb, or member; consequently heir-looms denote limbs or members of the inheritance. They are such things as cannot be taken away without damaging or dismembering the freehold. Whatever, therefore, is strongly affixed to the inheritance, and cannot be severed from it without violence or damage, *quod ab aedibus non facilè revellitur*, is a member of the same, and shall pass to the heir, as chimney-pieces, pumps, tables, and benches, which have been long fixed^(t). The law is the same in regard to coppers, leads, pales, posts, rails, window-shutters, windows, whether of glass or otherwise, wainscots, doors, locks, keys, mill-stones fixed to a mill, anvils, and the like. They are annexed to the freehold, and are held to form part of it^(u).

(p) 3 Bac. Abr. 64. Off. Ex. 60.

(q) Ibid. Stukeley v. Butler, Hob. 173.

11 Co. 50.

(r) Com. Dig. Biens. H. 11 Co. 50.
4 Co. 63 b.

(s) 11 Vin. Abr. 168. Ow. 49.

(t) 2 Bl. Com. 427, 428. Ld. Petre v. Heneage, 12 Mod. 520.

(u) 4 Burn. Eccl. L. 256. 3 Bac. Abr. 63. Off. Ex. 62. 4 Co. 63, 64. Swinb. p. 6. s. 7.

Although pictures and looking-glasses generally go to the executor, as personal chattels, yet it has been held, that if they are put up instead of wainscot, they shall belong to the heir. He has a right to the house entire and undefaced (*).

But at so remote a period as that of Henry the Seventh, it was adjudged, that if the lessee annex any chattel to the house for the purposes of his trade, he may disunite it during the continuance of his interest, if he can do so without prejudice to the freehold. And therefore, that if such lessee be a dyer, and erect a furnace in the middle of the floor not affixed to any wall, he, and by consequence his executor, may take it down during the term, if it can be removed without injury to the inheritance; [198] that while the term continues, he is the owner both of the floor and of the furnace, but that if it be not severed while his interest subsists, it goes to the lessor of his heirs, inasmuch as the lessee is not master of both the subjects of alteration (y).

In modern times, the doctrine of annexation has, on principles of public policy, been gradually relaxing; therefore, if things of this species can be removed without injury to the fabric of the house, or the soil of the freehold, they shall, in general, be the property of the executor (z). Thus, modern tables, although fastened to the floor, grates, iron ovens, jacks, clock-cases, in whatever mode annexed to the freehold, have by more recent cases been held to belong to the executor (a). So also have hangings, tapestry, beds fastened to the ceiling, and iron backs to chimneys (b). So, likewise in favour of trade, brewing vessels, vats for dyers, and soap-boilers' coppers. So also furnaces, though fixed to the freehold, and purchased with the house (c). It has also been ruled, that a cyder mill erected on the land shall go to the executor, and not to the heir. And in

(*) L. of Test. 380, 381. Cave *v.* Cave, 2 Vern. 508.

(y) 3 Bac. Abr. 63. Keilw. 88. Ow. 70, 71. Off. Ex. 60, 61. Ex parte Quincy, 1 Atk. 477. Poole's Case, Salk. 368. L. of Test. 380.

(z) 3 Bac. Abr. 68, in note. Ld. Dudley *v.* Ld. Warde, Ambl. 113. Harvey *v.* Harvey, 2 Str. 1141.

(a) 4 Burn. Eccl. L. 257.

(b) 4 Burn. Eccl. L. 256. 259. L. of Ni. Pri. 34. Harvey *v.* Harvey, 2 Str. 1141. Ex parte Quincy, 1 Atk. 477. Beck *v.* Rebow, 1 P. Wms. 94.

(c) Poole's Case, Salk. 368. L. of Ni. Pri. 34. Ex parte Quincy, 1 Atk. 477. Lawton *v.* Lawton, 3 Atk. 14. 16. 11 Vin. Abr. 167. 172. Squier *v.* Mayer, 2 Freem. 249. Harg. Co. Litt. 53. note 5.

a case where the litigating parties were the executor of the [199] tenant for life, and the remainder-man, the Lord Chancellor seemed to be of opinion that a fire-engine set up for the benefit of a colliery, as between heir and executor, might in some instances be considered as personal property (^d). Such latitude encourages improvements, and is beneficial to trade. But if the subject be not capable of removal without injury to the freehold; as, if a furnace is so affixed to the wall of a house as to be essential to its support, it shall not be taken away by the executor (^e).

The ancient jewels of the crown are also held to be heir-looms, for they are necessary to maintain the state, and to support the dignity of the existing sovereign (^f).

So also the collar of S. S. is an heir-loom, and shall go to the heir (^g).

There are also other personal chattels, which descend to the heir in the nature of heir-looms; as ancient portraits of former owners of the mansion, though not fastened to the walls, a monument or tombstone in a church, or the coat armour of his ancestor there hung up, with the pennons and other ensigns of honours suited to his degree (^h). And the court will order an inspection of articles claimed by the plaintiff as heir-looms, in a chest at the bankers of the defendant, who insists by his answer that he has a lien on the contents of the chest (ⁱ). Pews [200] also in a church may immemorially descend from the ancestor to the heir, as appurtenant to his house (^k).

By the special custom of some places, carriages, and also various articles of household furniture and implements, may be heir-looms. But such custom must be strictly proved (^l).

On the other hand, a granary built on pillars in Hampshire is by custom a chattel, and belongs to the executor (^m).

(^a) Lord Hardwicke in Lawton *v.* Lawton, 3 Atk. 15. See also Elwes *v.* Maw, 3 East. T. Rep. 38.

(^c) Off. Ex. 61. 4 Burn. Eccl. L. 256. 11 Vin. Abr. 166.

(^f) 2 Bl. Com. 428. Harg. Co. Litt. 18 b.

(^g) 11 Vin. Abr. 167. Ow. 124.

(^b) 2 Bl. Com. 429. Harg. Co. Litt. 18 b.

(ⁱ) Earl of Macclesfield *v.* Davis, 3 Ves. & Bea. 16.

(^k) 2 Bl. Com. 529. 12 Co. 105.

(^l) Ibid. 428. Harg. Co. Litt. 18 b.

(^m) 11 Vin. Abr. 154.

The heir is likewise entitled to other personal chattels inanimate, to which this appellation of heir-looms does not belong. An annuity, although only a chattel interest, is, as we have seen (n), descendible to the heir (o). So, a grant from the crown of one thousand pounds *per annum* out of the four and a half *per cent.* Barbadoes duty, with collateral security out of other revenue, although a mere personal chattel, having no relation to lands or tenements, nor partaking of the nature of a rent, was adjudged to the heir (p). But such an annuity is personal property, and will pass under a will attested by two witnesses, by a residuary clause, bequeathing all the rest, residue and remainder of the personal estate to the executor (q). So where A on his marriage settled land on himself and his wife, and the issue of the marriage, with remainder over, and assigned to trustees bankers assignments established by act of parliament, and made a perpetual annuity redeemable by parliament, and directed to go as personal estate, and limited the profits thereof to the same person as by the settlement would be entitled to the land, and if the annuities should be redeemed by parliament, the money should be invested in the land, to be settled to the same uses, and A died; it was decreed that these annuities being thus redeemable were to be considered as money directed to be laid out in lands, and to be as real estate, which after the wife's death should go to the settler's heir (r). On the other hand, a perpetual annuity of 4,000*l.* issuing out of the revenue of the post-office, but redeemable upon payment of 100,000*l.* when the state of affairs would permit, which sum, when paid, was to be laid out in the purchase of lands to be settled in manner there mentioned, was not considered as money to be laid out in land, but merely as a perpetual annuity, inasmuch as there was no certainty of the redemption (s).

Where a copyhold tenement was burnt down, and money collected on briefs for rebuilding it was lodged in the hands of

(n) *Vid. supr.* 178.

(o) 11 *Vin. Abr.* 153. *Argdo. Roper v. Radcliffe,* 10 *Mod.* 237. *vid. also 11 Vin. Abr.* 146. pl. 25. *Dr. & Stud.* 90.

(p) *Com. Dig. Biens.* A. 2. *Earl of*

Stafford v. Buckley, 2 *Ves.* 170.

(q) *Aubin v. Daly,* 4 *Barn. & Ald.* 59.

(r) *Disher v. Disher,* 1 *P. Wms.* 204.

(s) *Countess of Holderness v. Marquis of Carmarthen,* 1 *Bro. C. Rep.* 377. and 1 *P. Wms.* 206. in note. S. C.

[201] a guardian of the tenant in tail, who died under age; it was held that the money should go to his heir, both because of the intail, and because it was copyhold; but that allowance should be made to his personal representative for the amount of the interest of the money from the time it was so lodged to the death of the infant (^s).

If A recover land and damages, or a deed relative to land and damages, and die before execution, his heir shall have execution for the land or deed, and the executor for the damages (^t).

SECT. III.

Of chattels which go in succession.

CHATTELS given to a corporation aggregate, as the dean and chapter of a cathedral church, the mayor and commonalty of a city, the head and fellows of a college, shall go in succession; but in case of a sole corporation, whether created by charter or prescription, as a bishop, parson, vicar, master of a hospital, and the like, chattels real and personal in possession, and in action, belong to their respective executors. Such property shall no more go to their successors than it shall go to an heir; for succession in a body politic is inheritance in case of a private person (^a). So, if the chattel be granted to such sole corporation and his successors: As, if a term for years be granted to a bishop and his successors, his executors shall have it (^b). So if an obligation or other specialty be executed to him and his successors, he can take it only as a private individual, and not in his corporate capacity (^c).

But by custom a corporation sole may take goods and chattels in succession, as in London, where the chamberlain is a

(^s) Com. Dig. Biens. B. Rook v. Warth, 1 Ves. 460.

(^t) 11 Vin. Abr. 145. 169. Beamond v. Long, Cro. Car. 227. Off. Ex. 93. Com. Dig. Execution, E. 1 Roll. Abr. 389.

(^a) Com. Dig. Biens. C. Franchises F. 16. 4 Co. 65. Harg. Co. Litt. 9 a.

(^b) 1 Roll. Abr. 515.

(^c) 4 Co. 65. Dy. 48 a. 2 Bl. Com. 430, 431.

special corporation for taking bonds for orphanage-money. And such custom has been frequently adjudged good^(d). Also in some instances, particularly of chattels in action, the law is the same without a custom^(e). As if the president of the college of physicians recover in debt against a party for practising without a license, his successor, and not his executor, shall have a *scire facias* on the judgment, for the debt was recovered as due to him and the college^(f).

So, if the master of an hospital recover in that character the [203] arrears of an annuity due to the hospital, and die, they go to his successor, and not to his executor^(g).

SECT. IV.

*Of chattels which go to a devisee or remainder-man: and herein
of emblements, and heir-looms.*

A DEVISEE of the lands is entitled to all those chattel interests which have been stated to belong to the heir^(a); and in one respect he has an advantage to which the heir is not entitled. Such devisee, and not the executor of the devisor, shall have the emblements. Thus it has been held, that if A, seised in fee of land, sow, and devise it to B for life, remainder to C in fee, and die before severance, B shall have the emblements, and not the executor of A: Or that if B die before severance, his executor shall not have them, but they shall go to him in remainder: Or that if the devise be only to B, and B die before severance, there his executor shall have them, though B did not sow. These points were so adjudged on the principle, that the devisee, in relation to the chattels belonging to the lands, stands in the place of the executor by the express terms of the [204] will^(b). This distinction, however, seems not very rea-

(^d) Harg. Co. Litt. 9 a. note 1. 4 Co.
64 b. Wilford, Chamberlain of Lon-

don, Cro. Eliz. 464. 682.

(^e) Harg. Co. Litt. 9 a. note 1. 11 Vin.
Abr. tit. Corporation L.

(^f) 1 Roll. Abr. 515.

(^g) Ibid.

(^a) 2 Bl. Com. 428.

(^b) Winch. 51. Gilb. L. of Ev. 248.
Vid. Grantham v. Hawley, Hob. 152.

sonable (^c): It appears strange, that the corn should pass to the devisee as appurtenant to the soil, and yet shall not descend to the heir. But a devisee of the goods, stock, and moveables, is, it seems, entitled to growing corn in preference both to the devisee of the land and the executor (^d).

In respect of the rights of the executor of tenant for life, as opposed to those of the remainder-man, it is a general rule, that where a party hath an uncertain interest in land, and his estate determines, yet he hath a title to the corn that is sown, and the other emblements on the land, though the property of the soil be altered (^e). With the view of giving all possible encouragement to agriculture, the law has created a property in the emblements distinct and separate from that of the soil, and has provided that such property shall be at the entire disposal of the owner, that he may not decline cultivation, lest the harvest should be reaped by a stranger. Moreover, the tenant who has sown has acquired a property in the corn by his expense and labour. It was his own in its original state, and before it was committed to the earth; and his property shall not be divested by its being sown on his own ground, and the less, on account of the skill and industry he has employed in raising it (^f).

[205] On these principles the doctrine of emblements in respect to the executor of tenant for life is founded. Therefore, if such tenant sow the land, and die before severance, inasmuch as his estate was uncertain, and determined by the act of God, his executor shall have the corn, and he may take it from off the ground of the remainder-man (^g). So it has been held, that at common law, on the death of tenant in dower, her executor was entitled to the corn; and that the statute of Merton (^h), which gives her the power of devising it, was passed only in affirmation of the common law (ⁱ).

If A seised in fee of land sow, and then convey it to B, and

(^c) Harg. Co. Litt. 55 b. note 2.

(^g) Id. 242. Harg. Co. Litt. 55 b. 5

(^d) Winch. 51. Cox v. Godslove, Holt's

Co. 116. Roll. Abr. 726, 727.

MSS. 157. L. of Ni. Pri. 34. Swinb.

(^h) 20 H. 3. c. 2.

933, 934. p. 7. s. 10.

(ⁱ) Gilb. L. of Ev. 245. Harg. Co. Litt.

(^e) Gilb. L. of Ev. 240.

55 b.

(^f) Id. 241.

die before severance, the corn shall belong to B, and not to the executors of A; on the principle, that every man's donation is to be taken most strongly against him; and therefore, it shall pass not only the land itself, but also the chattels which are incidental to it^(k). If A seised in fee of land sow, and then convey it to B for life, with remainder to C for life, and B die before the corn is reaped, C shall have it, and not the executors of B, for B had no property in the corn arising from his own charge and industry, but merely by A's donation of the land, to which the corn is appurtenant; and by force of the same [206] donation, by which B had a right to the corn, C is entitled to it after the death of B^(l).

If A seised in fee sow land, and give it to B for life, remainder to C for life, and they both die before severance, it shall go to A; for when the force of the donation is spent, the property shall result to the donor^(m). If a disseisor of tenant for life sow the land, and such tenant die before severance, his executor, and neither the disseisor nor the reversioner, shall have the corn⁽ⁿ⁾. But trees shall not be regarded in favour of the executor of the tenant for life, any more than of any other executor, as emblements, or as distinct from the soil; for they are parcel of the inheritance, and are planted for the benefit of future generations^(o). Therefore, if such tenant plant oaks, or other timber trees, or trees not timber, or hedges, or bushes, they shall not go to his executor, but to him in remainder^(p). If, as we have seen, the tenant in fee make a lease excepting the trees, and afterwards grant the trees to the lessee, they are not re-annexed to the inheritance, but the lessee has an absolute property in them, and they shall go to his executor^(q).

But if tenant by the curtesy, or in dower, or after possibility [207] of issue extinct, cut down trees, they shall not go to the executor, but to the remainder-man, or reversioner^(r). So, if

^(k) Gilb. L. of Ev. 247.

123. Co. Litt. 55 b.

^(l) Gilb. L. of Ev. 247. Grantham v. Hawley, Hob. 132. Roll. Abr. 727.

^(p) Gilb. L. of Ev. 249. Com. Dig. Biens. G. I. H. Harg. Co. Litt. 55 b.

^(m) Gilb. L. of Ev. 248. Grantham v. Hawley, Hob. 132.

Lat. 270.

⁽ⁿ⁾ 2 Bac. Abr. 64. Goulds. 143.

^(q) Com. Dig. Biens. H. 4 Co. 63 b.

^(o) Gilb. L. of Ev. 242. 2 Bl. Com.

^(r) Com. Dig. Biens. H. 4 Co. 63. 11

Co. 82.

A, tenant for life, with remainder to **B** for life, cut down trees, they shall belong to him in reversion (s).

Yet, if there be a lessee for life, or years, without impeachment of waste, he has such an interest and property in timber trees, that, in case they are cut down in his lifetime, or during the term, they shall belong to his executor (t).

If the trees are thrown down by tempest in the lifetime of such lessee, or during the term, they shall go to his executor, and vest equally as if they had been severed by the act of the party (u). But a lessee, though without impeachment of waste, has not an absolute property in the trees; for if they are not cut down in his lifetime, or during the term, his executor shall not have them, but they shall go to the lessor, as annexed to the freehold (w). So, if **A**, tenant for life, without impeachment of waste, with power to cut trees, and to make leases for three lives, lease for three lives, excepting the trees, and die before they are cut, the trees are re-annexed, and shall not be severed by his executor (x).

[208] A tenant *pur autre vie* is considered by the law, in regard to emblems, in the same light as a tenant for his own life: and therefore if a man be tenant for the life of another, and the *cestui que vie* die after the corn be sown, the tenant *pur autre vie*, and in case of his death, his executor, shall have the emblems (y).

The advantages of emblems are also extended to the parochial clergy, by the stat. 28 H. 8. c. 11. (z). [1]

(s) Com. Dig. Biens. H. Al. 81.

(x) Lat. 163.

(t) Com. Dig. Biens. H. Harg. Co. Litt.

(y) 2 Bl. Com. 123.

220. Moore, 327. 11 Co. 82 b.

(z) 2 Bl. Com. 123. vid. 1 Roll. Abr.

(u) 11 Co. 84. 1 Roll. Rep. 183.

655.

(w) 1 Roll. Rep. 182. Lat. 270.

[1] The following provisions have been made with regard to emblems, in the states of Rhode Island, South Carolina, and Kentucky.

If the decedent die after the first day of March, the emblems severed before the thirty-first of December next following are assets in the hands of the executor or administrator; but such as are growing upon the lands on the last day, or at the time of the death of the testator or intestate, if that event happen after the thirty-first day of December and before the first day of March, pass with the land to the heir, devisee, or tenant in reversion or remainder.

The lessees of tenants for life, at common law, on the death of the lessors, exercised the unreasonable privilege of quitting the premises, and paying rent to nobody for the occupation of the land subsequent to the last quarter-day, or other day assigned for the payment of rent: For the representative of the tenant for life could maintain no action for the use and occupation, much less in case there were a lease; nor had the remainder-man such a right, because the rent had not accrued due in his time^(a). Nor could equity relieve, by apportioning it^(b). To remedy which hardship it is now enacted by stat. 11 Geo. 2. c. 19. § 15. that the executors of tenant for life, on whose death any lease determined, shall, in an action on the case, recover [209] of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor.

The provisions of this statute have, by an equitable construction, been extended also to the case of tenants in tail, where leases are determined by their deaths^(c).

Equity, however, will not in general apportion dividends of stock^(d); but where the money is laid out in a mortgage till a purchase can be made, the interest is capable of being apportioned^(e), and the distinction seems to turn on this point, that the interest on a mortgage is in fact due from day to day, and, therefore, not properly an apportionment; whereas the dividends accruing from the public funds are made payable on certain days, and, consequently, cannot be apportioned^(f). On the principle of this distinction, dividends of money directed to be laid out in land, and in the meantime to be invested in government securities, and the interest and dividends to be applied as the rents and profits would in case it were laid out in [210] land, were held not to be apportionable, though the tenant

^(a) 2 Bl. Com. 124. 1 Fonbl. 2d edit. 384. Jenner *v.* Morgan, 1 P. Wms. 392. Paget *v.* Gee, Ambl. 199.

^(b) Jenner *v.* Morgan, 1 P. Wms. 392. Hay *v.* Palmer, 2 P. Wms. 502. sed vid. Anon. Bubn. 294.

^(c) Paget *v.* Gee, Ambl. 198. Vernon

v. Vernon, 2 Bro. Ch. Rep. 659.

^(d) Rashleigh *v.* Master, 3 Bro. Ch. Rep. 99.

^(e) Edwards *v.* Countess of Warwick, 2 P. Wms. 176.

^(f) 1 Fonbl. 2d edit. 385. Hay *v.* Palmer, 2 P. Wms. 501 and 503. note 1.

for life died in the middle of the half year (^g). And the decision was the same, where the money had been originally secured by mortgage, but by order of the court had been transferred on government securities (^h).

But where, by a marriage settlement, maintenance for daughters was made payable half-yearly at Lady-day and Michaelmas, and to continue until their portions should become payable, namely, at their age of eighteen, or marriage, the portions and maintenance to be raised out of the rents and profits of the estate, or by sale, mortgage, or lease of the premises, and one of the daughters attained the age of eighteen on the 16th of August, she was decreed to have maintenance *pro rata* from the last Lady-day to the time of her attaining that age. On the ground that the general intention of the settlement was clear, that maintenance should be paid during the whole interval of time from the commencement of the term till the portion should become due, that is to say, half-yearly on the days above specified in every instance where it could happen, and where that could not be, it was a case not directly provided for by the settlement, as to the time of payment, but within the general provision of the maintenance itself, which was expressed to continue till the portions should become payable (ⁱ).

And even dividends of money in the funds, directed to be applied to the maintenance of an infant, or secured by the husband as a separate provision for his wife, would perhaps be apportioned in equity; inasmuch as it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of the quarter (^k). And on this principle, an apportionment of an annuity, being for the separate maintenance of a feme covert, has been allowed at law (^l). Yet if the quarterly payments were originally prospective payments, by way of maintenance for the ensuing quarter, and not payable at the end of each quarter, in order to discharge the expenses

(^g) Com. Dig. Chancery (4. N. 5.)

Sherrard *v.* Sherrard, 3 Atk. 502.

Wilson *v.* Harman, Ambl. 279. S. C.

2 Vez. 672. sed vid. 3 Vin. Abr. 18.

pl. 3.

(^h) Pearly *v.* Smith, 3 Atk. 260.

(ⁱ) Hay *v.* Palmer, 2 P. Wms. 501.

(^k) Vid. 1 Fonbl. 2d edit. 386. and 2 Bl. Rep. 1017.

(^l) Howell *v.* Hanforth, 2 Bl. Rep. 1016.

incurred in the three preceding months, that circumstance might make a difference (^m).

If a lessee for life of a manor seize an estray, and die before the year and day are elapsed, it shall belong to his executor (ⁿ).

[211] In regard to heir-looms, I have already stated, that the strictness of the ancient rule has in later time been relaxed, as between the executor and the heir (^o). But it has been still more so as between the executors of tenant for life, or in tail, and the reversioner (^p).

Hence, it has been adjudged, that a fire-engine set up for the benefit of a colliery by tenant for life, or in tail, shall be considered as his personal estate, and shall go to his executor, and not to the remainder-man. And indeed reasons of public convenience operate more strongly as between such parties, than even as between heir and executor. A tenant for life would be discouraged from making improvements, if the benefits of them might devolve, not on his personal representatives, but on a remote remainder-man, perhaps the next day after the improvements were effected (^q).

(^m) *Per de Grey, C. J.* 2 Bl. Rep. 1017. (^p) *L. of Ni. Pri.* 34.

(ⁿ) 11 Vin. Abr. 145. Moore, 11.

(^o) *Lawton v. Lawton*, 3 Atk. 13. *Lord Dudley v. Lord Warde*, Ambl. 198.

(^o) *Supr.* 198.

CHAP. V.

OF THE CHATTELS WHICH GO TO THE WIDOW.

SECT. I.

Of the chattels real which go to the widow: and herein also, of such chattels real as belong to the surviving husband.

IN contemplation of law, a complete unity of person subsists between the husband and wife. As long as the relation continues, they are regarded as one individual. The very existence of the wife is suspended during the coverture, or entirely merged, or incorporated in that of the husband. On this principle, whatever personal property belonged to her when sole, is vested in the husband by the marriage (^a).

And, first, in regard to chattels real: Some are in the nature of a present vested interest, in others she has only an interest possible, or contingent. Of the first class are leases for years, estates by statute-merchant, statute-staple, or elegit, or any other chattel real in her possession. The second class is distinguished into such as are called possibilities, and such as are [213] denominated contingent interests; as, if a term of years be devised to A for life, and after A's death to B, B's interest in the residue of the term operates by way of executory devise, and is styled a possibility. But, if a real estate be limited to A for life, and after the decease of A, and if B die in A's lifetime, to C for a term of years, this operates not as an executory devise, but as a remainder, and therefore is considered as a contingent interest (^b).

In the chattels real of the wife, present and vested, an interest of the nature of the joint-tenancy of the husband and wife is created by the marriage, and is a consequence of their legal unity, but subject to alienation by the husband in his lifetime (^c);

(^a) 2 Bl. Com. 433. Com. Dig. Baron & Feme, D. 1.

(^b) Harg. Co. Litt. 351. note 1.

(^c) Plowd. 418. 2 Bl. Com. 435.

for example, in case of a lease for years, he shall, during the coverture, receive the rents and profits of it; but if he does nothing more, on his dying before his wife, it shall survive to her, and shall not go to his executor; but he may during the coverture alienate it, either directly or consequentially, by such acts as shall induce an alienation. He may sell, surrender, or dispose of it in his lifetime at his pleasure. On his attainder or outlawry, it shall be forfeited to the king, or it may be taken in execution for his debts (^d).

He has also during coverture a right to assign such possible [214] and contingent interests as have been just mentioned, unless, perhaps, in those cases where the possibility or contingency is of such a nature that it cannot happen during his life. As where a lease is granted to the husband and wife for their lives, with remainder to the executors of the survivor (^e). Or unless, in equity at least, the future or executory interest in a term, or other chattel, were provided for the wife with the consent of the husband before marriage, for in that case his disposition of it would be a breach of his own agreement (^f).

If the husband dispose not of the chattels real of the wife in his lifetime, and die before her, they shall not pass by his will, nor shall they go to his executor; for, not having altered the property in his lifetime, they were never transferred from the wife; but after his death, she shall remain in her ancient possession (^g).

But, if the husband grant the term, or condition that the grantee shall pay a sum of money to his executors, though the condition be broken, and the executors enter, this is a disposition of the term, and the wife is barred of it, for the whole interest was passed away (^h).

[215] If the husband and wife be ejected of the term, and the husband bring an ejectment in his own name only, and recover, this also is an alteration of the term, and vests it in the husband (ⁱ); for his suing alone is expressive of his intention to

(^d) 2 Bl. Com. 434. Harg. Co. Litt. 46 b. Plowd. 263.

(^e) 10 Co. 51. Harg. Co. Litt. 46 b. Com. Dig. Baron and Feme, E. 2.

(^f) Harg. Co. Litt. 351. note 1.

(^g) 2 Bl. Com. 434. Plowd. 418.

(^h) Com. Dig. Baron and Feme. E. 2. Harg. Co. Litt. 46 b.

(ⁱ) 1 Roll. Rep. 359. Harg. Co. Litt. 46 b. sed vid. note 6. ibid.

divest the wife of her interest, and to treat the term as exclusively his own.

If he submit the term to the arbitration of A, who awards it to B, it will be a disposition by the husband against the wife (^k). So, the husband may make a lease of the term to commence after his death, and it shall be good, although the wife survive (^l) ; but he cannot charge such chattel real beyond the coverture ; as, if he grant a rent-charge out of the term, and the wife survive, she shall avoid the charge, for by her survivorship she is remitted to the term, of which the coverture did not divest her (^m).

Nor if there be judgment against him, can execution be sued out after his death against the term (ⁿ) ; nor shall it after his death be extended on a statute or recognizance acknowledged by him (^o) ; nor, as it seems, for a debt due from him to the king (^p). [216] Nor, has his disposition of part of the term the effect of a disposition of the whole. As, if A be possessed of a term for forty years, in right of his wife, and grant a lease for twenty years, reserving a rent, and die ; although the executors of the husband shall have the rent, for it was not incident to the reversion, inasmuch as the wife was not party to the lease, yet she shall have the residue of the term (^q). If the term be extended, the wife shall have the term after the extent is satisfied (^r). If the husband and wife mortgage the term, and the husband pay the money, and enter and die, the wife shall have it (^s). If the wife and her husband were joint tenants of a rent-charge for their lives, the wife, in case she survive, shall have the arrears incurred during the coverture (^t). If the husband and wife make a lease reserving rent, and she assent after the death of the husband, she shall have the arrears incurred in his lifetime (^u). Or if the husband be entitled to an advowson

(^k) Dyer, 183.

(^q) Harg. Co. Litt. 46 b.

(^l) Grute *v.* Locroft, Cro. Eliz. 287.

(^r) 1 Roll. Abr. 344.

Poph. 5.

(^s) Ibid.

(^m) Harg. Co. Litt. 351. Plowd. 418.

(^t) 1 Roll. Abr. 350. Dembyn *v.* Brown,

(ⁿ) 1 Roll. Abr. 344. 346.

Moore, 887.

(^o) 1 Roll. Abr. 346.

(^u) Ibid. 350.

(^p) 2 Roll. Abr. 157. 1 Roll. Abr. 346.

in right of his wife, and after an avoidance, but before presentation, die, his wife, and not his executors, shall present (^w).

In case the wife die before the husband, all the chattels real of the wife, in which there exists a present, actual, and vested interest, become absolutely and entirely his own by survivorship [²¹⁷] (^x), and that without taking out administration to her (^y). To entitle himself to her chattels real, which are not so vested, he must make himself her representative, by becoming her administrator. It seems formerly to have been doubted, whether, if, having survived his wife, he died during the suspense of the contingency on which any part of his wife's property depended, his representative, or his wife's next of kin, had a right to the benefit of it; but by a series of authorities it is now settled, that the husband's representative is beneficially entitled as well to this species of the wife's property (^z), as to any other, which devolved to him either as survivor, or by virtue of the grant of administration. And although the husband's right to such grant be personal only, and not transmissible, and, as I have before stated (^a), the spiritual court be in such case obliged by the stat. 31 E. 3. to commit administration to the next of kin of the wife, yet such grantees is regarded in equity as a mere trustee for the representative of the husband (^b).

If the tenant in dower grant a lease for years, and marry, and die, the husband shall have the rent in arrear in his wife's lifetime (^c). And by the stat. 32 Hen. 8. c. 37. arrears of rent due as well before as after coverture to the wife seised in fee, in tail, or for life, are on her death given to the husband. If [²¹⁸] the husband be entitled to an advowson in right of his wife, and he survive, he shall have an avoidance which happened during the coverture (^d). If a wife were possessed at her marriage of a trust term to her separate use, the surviving

(^w) Com. Dig. Baron and Feme, E. 3.
Co. Litt. 351.

(^x) Co. Litt. 300. Com. Dig. Baron and Feme, E. 2.

(^y) Com. Dig. Baron and Feme, E. 2 Roll. Abr. 345.

(^z) Harg. Co. Litt. 351. note 1.

(^a) Supr. 116.

(^b) Sed vid. Harg. Co. Litt. 351. note 1. 1 Harg. Law Tr. 475. in note.

(^c) Moore, 7.

(^d) Com. Dig. Baron and Feme, E. 3.
Harg. Co. Litt. 351.

husband shall be entitled to it, except in special cases^(e); as if, before marriage, it were settled on her with the assent of the husband^(f). If the husband and wife mortgage a term of the wife, and the husband survive, he shall have the equity of redemption^(g).

If the husband sow the land of which he is seised in right of his wife, and she die, he shall have the profits^(h). Or if he die before the wife and before severance, his executors shall be entitled to them; but it seems, that in the event of his so dying, if the lands were sown before the marriage, the wife shall have the profits, and not the executors of the husband: for the corn committed to the ground belongs to the freehold, and is not transferred to the husband; and, therefore, as it was undisposed of in his lifetime, it devolves to the wife⁽ⁱ⁾. So, if A, seised in fee, sow copyhold lands and surrender them to the use of his wife, and die before severance, it seems that the wife shall have [219] the corn, and not the executors of the husband; for this is a disposition of the corn, as appurtenant to the land, and since the husband disposed of it during his life, it cannot belong to his executors^(k). But, if the husband and wife be joint tenants, and the husband sow the land, and die, it seems the corn shall go to the executor of the husband, for the land is not cultivated by a joint stock, the corn is altogether the property of the husband, and it shall not be lost by being committed to their joint possession, any more than if it had been sown in the land of the wife only^(l). [1]

(e) Com. Dig. Baron and Feme, E. 2.
1 Fonbl. 98. Sir Edward Turner's Case, 1 Vern. 7. Pitt v. Hunt, ib. 18. Tudor v. Samayne, 2 Vern. 270. Jesson v. Moulson, 2 Atk. 421. Sed vid. Countess Strathmore v. Bowes, 2 Bro. Chan. Rep. 345.

(f) Com. Dig. Chan. 2 M. 9. Harg. Co. Litt. 351. note 1.

(g) Young v. Radford, Hob. 3.

(h) Gilb. L. of Ev. 245. Harg. Co. Litt. 55 b.

(i) Gilb. L. of Ev. 246. Harg. Co. Litt. 55 b. note 5. Roll. Abr. 727.

(k) Roll. Abr. 727.

(l) Gilb. L. of Ev. 245. Roll. Abr. 727. Sed vid. Harg. Co. Litt. 55 b. et note 7. Vin. Abr. tit. Emblems, pl. 16. Com. Dig. Biens. G. 2. L. of Test. 380.

[1] The general rule is, that the *choses in action* of the wife survives to her unless the husband had reduced them into possession, or assigned or released them, during the coverture. And the rule is the same, where the husband and

SECT. II.

Of the chattels personal which go to the widow: and herein, of such personal chattels of the wife as go to the surviving husband.

CHATTELS personal, or *chooses in action*, as debts on bond, simple contracts, and the like, do not vest in the husband, until he receives, or recovers them at law. When he has thus reduced them into possession, they become absolutely his own, and at his death, shall go to his representatives, or as he shall [220] appoint by his will, and shall not revest in his wife (^a).

In respect to such *chooses in action* as vested in the wife before her marriage, the husband must sue jointly with her to recover

(^a) 2 Bl. Com. 434. Harg. Co. Litt. 351.

wife jointly become entitled to a *chose in action* during coverture. *Lodge v. Hamilton*, 2 Serg. & R. 493. Therefore, a recognizance taken in the Orphan's Court, for the wife's share of land, in the name of husband and wife, in right of the wife, and not reduced into possession or disposed of by the husband, survives on his death to the wife, although the husband may have died indebted. *Ibid.* And a divorce *à vinculo* for the adultery of the wife, makes no alteration in the right of the wife, if the husband does no act after the divorce to affect it. *Ibid.* And this right is good against his creditors, unless he stood in the light of a purchaser of her property in consequence of marriage articles, or some agreement made on a valuable consideration. *Ibid.*

A husband may extinguish a wife's *choses in action* by a release, and he may in equity assign away a possibility to which she is entitled, so far as, that a Court of equity will decree a specific performance when the right vests, if the assignment were made for a valuable consideration. *Krumbhaar v. Burt & al.* C. C. 3d Circuit, Oct. 1808. MS. Reports Wharton's Digest, 297.

A legacy to the wife of a bankrupt is a mere possibility, which did not pass to the assignees of the husband under the Act of 1800. *Ibid.*

It seems that where husband makes a lease of wife's land, the wife not being party to the lease, *it is void* as to her; and acceptance of rent, or other act of the wife, after the death of the husband, will not confirm it. *Jackson, Campbell & al. v. Holloway*, 7 Johns. Rep. 81.

If *chooses in action* be not reduced into the possession of the husband during the coverture, they remain the property of the wife, on the dissolution of the marriage, either by death of the husband or by divorce *à vinculo*. *Legg v. Legg*, 7 Mass. Rep. 99.

them^(b). As to such of the wife's *chooses* in action, as accrued subsequent to the coverture, he may sue either in their joint names, or alone, at his pleasure^(c).

If he join her in action and recover judgment, and die, the judgment will survive to her on the principle, that although his bringing the action in his own name alone be a disagreement to the wife's interest, and indicate his intention that it shall not survive to her: Yet if he bring an action in the joint names of himself and his wife, the judgment is, that they both shall recover, and therefore such action does not alter the property, nor imply an intention on his part to do so, and, consequently, the surviving wife, and not the representative of the husband, is entitled to a *scire facias* on the judgment^(d).

Indeed it has been asserted by a great authority, that, even in the case of the husband's suing alone for the wife's debt and [221] his dying before execution, his wife, and not his executors, shall be thus entitled^(e).

Such chattels shall, *a fortiori*, survive to her, if the husband die before he has proceeded to reduce them into possession^(f). Hence a portion due to an orphan in the hands of the chamberlain of London, unless it be recovered, or received by the husband, shall, on his death, go to his wife, and not to his executor, for it is clearly a *chouse* in action^(g). So before the stat. 5 Geo. 2. c. 30. s. 25. where the debtor to the wife became bankrupt, and the husband claimed the debt and paid the contribution-money, and died before any dividend, his wife, and not his executor, was held entitled to the debt, for by such payment the property was not altered^(h). So if an estray come into the wife's franchise, in case the husband die without seizing it, his wife, and not his executors, are entitled to the seizure. In all

^(b) Com. Dig. Baron and Feme, V. 1 Roll. Abr. 347. Ow. 82. Woodward v. Parry, Cro. Eliz. 537. Garforth v. Bradley, 2 Ves. 676. 1 Sid. 25.

^(c) Blackburn v. Greaves, 2 Lev. 107. Howell v. Maine, 3 Lev. 403. A. 1. 36. Cappin v. ——, 2 P. Wms. 497. Vid. Hutchinson v. Hewson, 7 Term Rep. 349.

^(d) Com. Dig. Baron and Feme, V. Harg. Co. Litt. 351. note 1.

^(e) Bond v. Simmons, 3 Atk. 21.

^(f) 2 Bl. Com. 434. Harg. Co. Litt. 351.

^(g) Com. Dig. Baron and Feme, E. S. Pheasant v. Pheasant, 2 Ventr. 341. S. C. Ca. Ch. 182.

^(h) Com. Dig. Baron and Feme, E. S. Anon. 2 Vern. 707.

these cases the husband's right is determined with the *cov-
ture* (i).

But, if the husband grant a letter of attorney to A to receive a debt or legacy due to the wife, and A receive it, but before he pays it over the husband die, it shall be considered as hav- [222] ing vested in his possession, and shall go to his executors (k). Such are the principles of law on this subject; but in equity it is held, that a settlement before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in her lifetime to her *chooses* in action. But it has been asserted, that if it be not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced by the husband. So, if it be in consideration of part of her fortune, such things in action as are not comprised in that part, it is said, survive to the wife. And in a case where a settlement was made to provide for the wife, without mentioning her personal estate, the Lord Keeper decreed, that such estate should belong to the representatives of the husband, and held, that in all cases where there is a settlement equivalent to the wife's portion, it shall be intended that the husband shall have the portion, although there be no agreement for that purpose (l). But the presumption of an agreement from the mere fact of a settlement being made by the husband, is peculiar to the case last cited, and has been disavowed by the court in several other cases (m).

Equity also considers money due on mortgage as a *chose* in action; and it seems to have been formerly understood, that since the husband could not dispose of lands mortgaged to the wife in fee without her, and the estate remained in her, she or her representatives were entitled to the money, as incident to it; but that in regard to a mortgage debt, secured by a term of

(i) 2 Bl. Com. 434. Harg. Co. Litt. 351 b.

(k) Roll. Abr. 342. Huntley v. Griffiths, Moore, 452.

(l) Harg. Co. Litt. 351. note 1. 3 P. Wms. 200. note D. Prec. Chan. Cleland v. Cleland, 63. Packer v. Wynd-

ham, 412. Blois v. Countess of Hereford, 2 Vern. 502. Adams v. Cole, Ca. Temp. Talb. 168.

(m) Lister v. Lister, 2 Vern. 68. Cleland v. Cleland, Prec. Chan. 63. See also Salwey v. Salwey, Amb. 692. and Druce v. Denison, 6 Ves. jun. 385.

[223] years, as the husband had an absolute power over the term, there was no obstacle to the debt's vesting in his representatives; but this distinction is exploded, and it is now held, that although in case of a mortgage in fee, the legal fee of the lands in mortgage continue in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt⁽ⁿ⁾.

If the husband and wife have a decree in equity, in right of the wife, and the husband die, the benefit of the decree belongs to the wife, and not to the executors of the husband^(o).

But if the wife's fortune be in the Court of Chancery, on the husband's death his representatives shall be entitled to it, subject to the same equity as before, in favour of the wife. In case of her death, it shall become the absolute property of the husband; and it has been held, even where the court detained the fund, in order to enforce a provision for the wife, and made a decree for that purpose, and she survived her husband, yet, that on her death, his representatives were entitled to it, inasmuch as it had absolutely vested in him by law. In these cases, it [224] seems to make no difference whether there be any issue of the marriage or not^(p). [1]

In case the husband survive the wife, her chattels real, as we have seen, shall become his absolute property^(q). But her *chooses* in action shall go to her representatives, excepting the arrears of rent due to her, which, as I have before stated, on her death, are, by stat. 32 Hen. 8. c. 37. given to the husband. The ground of the distinction is this: The husband is in absolute possession of the chattel real during coverture, by a kind of joint-tenancy with his wife, and therefore the law will not wrest it from him, though if he had died first it would have

⁽ⁿ⁾ Harg. Co. Litt. 351. note 1. Bosvil v. Brander, 1 P. Wms. 458. Bates v. Dandy, 2 Atk. 207.

^(o) Harg. Co. Litt. 351. note 1. Nanney v. Martin, 1 Chan. Ca. 27. Carr v.

Taylor, 10 Ves. jun. 579, 580.

^(p) 1 Fonbl. 8. 89. Packer v. Wyndham, Prec. Chan. 418. Perkins v. Thornton, Ambl. 503.

^(q) Supr. 216.

[1] The Courts of Pennsylvania have no authority to insist on a provision for the wife, when the husband applies for her personal property. *Yoho v. Barnet*, 1 Binn. 365.

survived to the wife, unless he had altered the possession in his lifetime: but a *chase* in action was never in his possession: He could acquire it only by suing in his wife's right, and as after her death he cannot as husband bring an action in her right, because they are no longer one and the same person-in-law, therefore he can never as such recover the possession. But, in the capacity of her administrator, he may recover such things in action as became due to her before or during the coverture (q).

In chattels personal, or *choses* in possession of the wife in her own right, as ready money, jewels, household goods, and the like, the husband hath an immediate, absolute, and actual property devolved to him by the marriage, which never can vest in the wife or her representatives (r). [2]

[225] Such chattels also as are given to the wife after the marriage shall belong to the husband, and he shall be entitled to them, although they had not come to his possession at the time of her death (s). Thus it hath been held, that if a legacy be left to a wife, to be paid twelve months after the testator's death, and the wife die within that period, her husband is entitled to it, for an immediate interest was vested in him, and subject to his release before the time of payment (t).

Such are the legal consequences of the unity of husband and wife; but courts of equity, although they recognise the rule of law which considers the husband and wife as one person, yet, in some cases, will treat their interests as distinct (u). If property be given generally to the wife, it shall vest in the husband, both in law and equity; nor shall it be supposed to be for her separate use, though she live apart from the husband (v).

(q) 2 Bl. Com. 435.

2 Roll. Rep. 134.

(r) 2 Bl. Com. 435. 3 Bac. Abr. 65.
Dr. & Stud. Dial. 1. cap. 7.

(u) 1 Fonbl. 87. Brooks *v.* Brooks,
Prec. Chan. 24. Moore *v.* Moore, 1
Atk. 272.

(s) Com. Dig. Baron and Feme, E. 3.
Miles' Case, 1 Mod. 179. 1 Sid. 337.

(v) Palmer *v.* Trevor, 1 Vern. 261.
Harvey *v.* Harvey, 2 Vern. 659.

[2] He will hold her property, discharged from the lien of the wife's debts, if the wife die before payment, and the husband do not assume her debt *Beach v. Lee*, 2 Dall. 257.

But where it is given to the separate use of the wife, she shall be entitled to it in equity independently of her husband (^w). And though it were always clear that she was thus entitled to such property, if trustees were interposed, yet it was formerly a doubt, whether she could take it where none were appointed (^x). It is now however settled in the affirmative. It has been held, that where A devised lands in fee to his daughter, a feme covert, for her separate use, without naming trustees, it should be a trust in the husband, for it makes no difference whether the trust be created by the act of the party, or by the act of the law (^y). So, where a bond was bequeathed to a wife for her sole and separate use, and no trustees nominated, it was held to be completely vested in her in equity (^z). [3]

And equity will not only raise a trust where the gift is expressly for the separate use of the wife, but will infer it from words not technical, or from the circumstances under which the gift is made, or, as it seems, merely from the nature of the subject: Thus, where an estate was given to a husband, for the livelihood of his wife, he was considered as a trustee for her separate use (^a). So where diamonds were given to the wife by the husband's father, on her marriage, it was held, that they were a gift to her separate use, and that she was in equity en-

(^w) Griffith *v.* Hood, 2 Ves. 452.

Darley *v.* Darley, 3 Atk. 399. Com.

(^x) 1 Fonbl. 98. Harvey *v.* Harvey, 1

Dig. Baron and Feme, D. 1.

P. Wms. 126. Burton *v.* Pierpoint,
2 P. Wms. 79.

(^z) Rolfe *v.* Budder, 1 Bunn. 187.

(^y) Bennet *v.* Davis, 2 P. Wms. 316.

(^a) Darley *v.* Darley, 3 Atk. 399.

[3] The intention to create a separate use for the wife must be very clear. For where a testator devised to his married daughter B, "the use, issues, and profits" of his lands and tenements at N, to hold to her during her natural life, &c. and by codicil reciting the devise in the will, and on further consideration, devised the same to C and D, "in trust for the use, benefit, and behoof of my daughter B, for and during her natural life, they or the survivor to rent out the same in the best manner, so that no waste is made of the timber, and the best care that can be, to preserve the land from abuse by extravagant tillage; she, the said B, to have all the rents, issues, and profits, for and during her natural life," and at her decease, to her male heirs, &c. Held, that there being no clear intent manifest, that the devise was for the separate use of B, the husband was entitled to the rents and profits. *Torbet v. Twining & al.* 1 Yeates, 432.

titled to them in her own right^(b). And, where a foreigner made the wife a present of trinkets, though not expressly for [227] her separate use, Lord Hardwicke, C. seemed to think they should be so construed^(c).

Gifts, likewise, from the husband to the wife, although the law does not allow the property to pass, shall, without prejudice to creditors, be supported in equity, whether trustees be interposed, or not^(d). Thus, where the husband transferred one thousand pounds South Sea Annuities in the name of his wife, she was held entitled to them, as given to her separate use^(e).

So trinkets given to the wife by the husband in his lifetime, were decided to be her separate estate^(f). And where a husband allowed his wife to make profit of all butter, poultry, fruit, and other trivial matters arising from the farm, beyond what was used in the family, out of which she saved one hundred pounds, which the husband borrowed, on his death the Court of Chancery allowed the agreement as a reasonable encouragement of the wife's frugality, and admitted her to come in as a creditor for that sum^(g). So where the husband agreed that the wife should take two guineas of every tenant beyond the fine paid to the husband for the renewal of a lease, this was allowed to be the wife's separate money^(h). But, in all such cases, to entitle the wife to such an allowance, there must be a sufficient fund for the payment of debts⁽ⁱ⁾. Nor will the court, in any case, permit a gift of the whole of the husband's estate, [228] while he is living; for that would not be in the nature of a mere provision, which is all she is entitled to^(k).

But, if the husband and wife live together, and he provide her with clothes and other necessaries, and she demand not but suffer him to receive the rents and profits of her separate estate, or her pin-money, or if she accept payments short of what she is entitled to on his death, neither she nor her representatives

^(b) Graham *v.* Londonderry, 3 Atk. 393.

^(c) 1 Fonbl. 98. Graham *v.* Londonderry, 3 Atk. 393.

^(d) Lucas *v.* Lucas, 1 Atk. 270.

^(e) Ibid. 271. Graham *v.* Londonderry, 3 Atk. 393.

^(f) Graham *v.* Londonderry, 3 Atk. 393.

^(g) Slanning *v.* Style, 3 P. Wms. 339.

^(h) Ibid. 1 Fonbl. 95.

⁽ⁱ⁾ Slanning *v.* Style, 3 P. Wms. 339.

^(k) Beard *v.* Beard, 3 Atk. 72.

shall have an account of such separate estate farther back than a year, for she shall be presumed to have waived her right to the antecedent produce (¹). Yet, under particular circumstances, it may be otherwise; as where the wife had three hundred pounds *per annum* pin-money, and the husband, for several years before his death, paid her only two hundred, but promised her that she should have the whole at last, she was held entitled to all the arrears (^m).

In like manner shall she be entitled to all arrears, if she lived separate from her husband (ⁿ).

But, if A, proposing to give a married woman money for her separate use, and to secure it, give her a note for a certain sum, as received, promising to be accountable, it shall be assets in the hands of the executor of the husband. So, likewise, if [229] a married woman deposit money in A's hands to be kept for her separate use, it shall be considered as part of the husband's estate (^o).

SECT. III.

Of the wife's paraphernalia.

THE wife, also, may acquire a legal property in certain effects of the husband at his death, which shall survive to her over and above her jointure, or dower, and be transmissible to her personal representatives (^a).

Such effects are styled paraphernalia; a term which, in law, imports her bed, and necessary apparel, and also such ornaments of her person as are agreeable to the rank and quality of the husband (^b). Pearls and jewels, whether usually worn

(¹) *Powell v. Hankey*, 2 P. Wms. 82.

(^a) *S Atk.* 695. 1 *Vez.* 298.

Thomas v. Bennett, ib. 340. *Fowler v.*

(^b) *Hodges v. Beverley*, *Bunb.* 188.

Fowler, 3 P. Wins. 355. *Lord Town-*

(^a) 2 *Bl. Com.* 435. 3 *Bac. Abr.* 66.

shend v. Windham, 2 *Vez.* 7. *Peacock*

Off. Ex. Suppl. 61, 62. 11 *Vin. Abr.*

v. Monk. 190.

178.

(^m) *Ridout v. Lewis*, 1 *Atk.* 269. See
also 1 *Eq. Ca. Abr.* 140. pl. 7.

(^b) *Com. Dig. Baron and Feme*, F. 3.
1 *Roll. Abr.* 911. *Swinb.* part 6. s. 7.

by the wife^(c), or worn only on birth-days, or other public occasions^(d), are also paraphernalia.

To what amount such claims shall prevail is a point which cannot admit of specific regulations. It must be left, on the [230] particular circumstances of the case, to the discretion of the court^(e).

In the reign of Queen Elizabeth, jewels to the value of five hundred marks were allowed, in the case of the wife of a viscount^(f). A diamond chain, of the value of three hundred and seventy pounds, where the lady was the daughter of an earl, and wife of the king's sergeant at law, in the reign of Charles the first, was considered as reasonable^(g). Jewels and plate bought with the wife's pin-money, to the amount of five hundred pounds, which bore a small proportion to the husband's estate, were regarded in the same light^(h). And Lord Hardwicke, C. held the widow of a private gentleman to be entitled to jewels worth three thousand pounds, as her paraphernalia, and that the value made no difference in the Court of Chancery⁽ⁱ⁾. By the custom of London, a citizen's widow may retain some of her jewels as paraphernalia, but not all^(k).

If the husband deliver cloth to the wife for her apparel, and die before it be made, she shall have the cloth, as of this species of property^(l). If the husband present his wife with jewels, [231] for the express purpose of wearing them, they shall be esteemed merely as paraphernalia, for if they were considered as a gift to her separate use, she might dispose of them absolutely, and so defeat his intention^(m).

The husband, if inclined to so unhandsome an exercise of his power, may sell, or give away in his lifetime, such ornaments and jewels of the wife, but he cannot dispose of them by will,

^(c) *Lord Hastings v. Sir A. Douglas*, Cro. Car. 343.

Cro. Car. 343. S. C. Jon. 332. Roll. Abr. 911. 11 Vin. Abr. 179. S. C.

^(d) *Graham v. Londonderry*, 3 Atk. 394.

Offley v. Offley, Prec. Chan. 27.

^(e) 3 Bac. Abr. 66. *Lord Hastings v. Sir A. Douglas*, Cro. Car. 343.

Northey v. Northey, 2 Atk. 77.

^(f) 2 Leon. 166. *Bindon's Case*, Moore, 213.

11 Vin. Abr. 180. Nels. Chan. Rep. 179.

^(g) *Lord Hastings v. Sir A. Douglas*,

1 Roll. Abr. 911.

^(h) *Darley v. Darley*, 3 Atk. 398.

any more than he can devise heir-looms from the heir⁽ⁿ⁾. In case of a deficiency of assets for payment of debts, the widow shall not be entitled to such paraphernalia^(o), not even if they were presents made to her by the husband before marriage^(p); nor shall she be so entitled where there are not assets at the time of the husband's death, although contingent assets should afterwards fall in^(q); on the principle, that the same might not have happened until twenty or thirty years after the death of the testator, nor possibly until after the death of the widow, when the end and design of the widow's wearing her bona paraphernalia in memory of her husband could not have been answered, and therefore it is reasonable that in such case it should be reduced to a certainty, namely, that if there should not be assets real or personal at the testator's death, or at least when the jewels are applied in the payment of debts, then the jewels shall be liable.

But, such ornaments, though subject to the debts, shall be preferred to the legacies of the husband, and the general rules of marshalling assets, (which will be treated of hereafter,) are applicable in giving effect to such priority^(r).

If the husband pawn the wife's paraphernalia, and die, leaving a fund sufficient to pay all his debts, and to redeem the pledges, she is entitled to have them redeemed out of his personal estate^(s). So where a husband pledged a diamond necklace of the wife, as a collateral security for money borrowed on a bond, and authorized the pawnee to sell it during his absence, at a sum specified, it was held, that this amounted not to an alienation, if it were not sold in his lifetime, and that it was redeemable for his widow^(t).

If a woman by marriage articles agree to claim such part

⁽ⁿ⁾ 2 Bl. Com. 436. *Graham v. Londonderry*, 3 Atk. 394.

^(o) 2 Bl. Com. 436. *Tipping v. Tipping*, 1 P. Wms. 730. *Tynt v. Tynt*, 2 P. Wms. 544. *Snelson v. Corbet*, 3 Atk. 369. *Bindon's Case*, Moore, 216.

3 Bro. P. C. 187.

^(p) *Ridout v. Earl of Plymouth*, 2 Atk. 104.

^(q) *Burton v. Pierrepont*, 2 P. Wms. 80.

^(r) 2 P. Wms. 80. note 1. *Tipping v. Tipping*, 1 P. Wms. 729. *Tynt v. Tynt*, 2 P. Wms. 542. *Lord Townshend v. Windham*, 2 Vez. 7. *Snelson v. Corbet*, 3 Atk. 369.

^(s) *Graham v. Londonderry*, 3 Atk. 395.

^(t) *Ibid.* 3 Atk. 395.

only of the effects of the husband as he shall give her by his will, she is excluded from her paraphernalia^(u). But her necessary apparel shall, in all cases, be protected, as decency and humanity require, even against the claims of creditors^(v).

If the husband bequeath to the widow her jewels for her life, and then over, and she make no election to have them as her paraphernalia, her executor shall have no title to demand them^(w).

(^u) 3 Bac. Abr. 66. Com. Dig. Baron and Feme, F. 3. Comely *v.* Comely, 2 Vern. 49. S. C. 83.

(^v) 2 Bl. Com. 436. 2 Roll. Abr. 911.
(^w) Clarges *v.* Albemarle, 2 Vern. 246.

CHAP. VI.

OF THE INTERESTS OF A DONEE MORTIS CAUSA.

ANOTHER species of interest in the personal property of the deceased remains to be considered. Such as vests neither in his executor, nor his heir, nor his widow, in those respective characters. It is created by a gift under the following circumstances. When in his last illness, and apprehensive of the approach of death, he delivers, or causes to be delivered, to or for a party, the possession of any of his personal effects, to keep in the event of his decease. Such gift is therefore called a *donatio mortis causâ*. It is accompanied with the implied trust, that, if the donor live, the property shall revert to him, since it is given only in contemplation^(a).

A party's wife is as capable of such gift as any other person^(b). And so is a negro brought to England as a slave, for the moment he set foot on English ground he was free^(c).

To substantiate the gift, there must be an actual tradition or delivery of the thing. The possession of it must be transferred in point of fact, and established by evidence beyond suspicion^[234] [1]. The purse, the ring, the jewel, or the watch, must be given into the hands of the donee, either by the donor himself or by his order^(d). But there are cases, in which

^(a) 2 Bl. Com. 514. 11 Vin. Abr. 176.
Hedges *v.* Hedges, Prec. in Chan. 269.

Drury *v.* Smith, 1 P. Wms. 404. 3
Binn. 370.

^(b) Lawson *v.* Lawson, 1 P. Wms. 441.
Miller *v.* Miller, 3 P. Wms. 356.

^(c) Shanley *v.* Harvey, 2 Eden's Rep.
126.

^(d) Walter *v.* Hodge, 2 Swans. Rep.
92.

^(d) Ward *v.* Turner, 2 Vez. 431. Tate
v. Hilbert, 2 Ves. jun. 111. Drury *v.*
Smith, 1 P. Wms. 404. Lawson *v.*
Lawson, 441. 3 *Binn.* 370.

[1] But such delivery may be made to a third person for the use of the donee; and a delivery to the wife of the donor for the use of the donee, is valid. *Wells v. Tucker*, 3 *Binn.* 370.

the nature of the subject will not admit of a corporeal delivery ; and then if the party go as far as he can towards transferring the possession, his bounty shall prevail. Thus, a ship has been held to be delivered by the delivery of a bill of sale defeasible on the donor's recovery. And, in a recent case, the Lord Chancellor seemed to be of opinion, that such donation might be effected by deed or writing (e).

The delivery also of the key of a warehouse, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods for such a purpose (f). So the delivery of the key of a trunk has been decided to amount to a delivery of the trunk, and its contents (g). Nor in those instances were the key and bill of sale considered in the light of symbols, but as modes of attaining the possession and enjoyment of their property (h). So a bond given in prospect of death, although a *chuse in action*, is a good donation *mortis causā*, for a property is conveyed by the delivery (i). Such, likewise, have been the [235] decisions in regard to bank notes (k). In all these cases, the donor delivers as complete a possession as the subject matter will permit.

But bills of exchange, promissory notes, and checks on bankers, seem incapable of being the objects of such donation (l). The delivery of these instruments is distinguishable from that of a bond, which is a specialty, and itself the foundation of the action, the destruction of which destroys the demand ; whereas the bills and notes are only evidence of the contract (m).

Nor shall a delivery merely symbolical have such operation. As, where on a deed of gift not to take place till after the grantor's death, a sixpence was delivered by way of putting the grantees in possession ; the ecclesiastical court held such delivery to be insufficient for the purpose, and pronounced for

(e) Tate *v.* Hilbert, 2 Ves. jun. 120.

(f) Ward *v.* Turner, 2 Vez. 434.

(g) Jones *v.* Selby, Prec. in Chan. 300.
Ward *v.* Turner, 2 Vez. 441. Vide also Tate *v.* Hilbert, 2 Ves. jun. 116.

(h) Ward *v.* Turner, 2 Vez. 443.

(i) Sudgrove *v.* Baily, 3 Atk. 214.
Ward *v.* Turner, 2 Vez. 441. Blount

v. Burrow, 4 Bro. Ch. Rep. 72. 3

Binn. 366.

(k) Drury *v.* Smith, 1 P. Wms. 404.
Miller *v.* Miller, 3 P. Wms. 356. Hill *v.* Chapman, 2 Bro. Ch. Rep. 612.

(l) Miller *v.* Miller, 3 P. Wms. 356.
Ward *v.* Turner, 2 Vez. 442. Tate *v.* Hilbert, 4 Bro. Ch. Rep. 291.

(m) Ward *v.* Turner, 2 Vez. 442.

the instrument as a will^(a). So it was determined in chancery, that the delivery of receipts for South Sea Annuities was in like manner ineffectual, and that, to make it complete, there ought to have been a transfer of the stock^(b). Least of all shall such donation be effectuated by parol, as, merely saying, "I give," without any act to transfer the property^(c). Nor where a man considering himself dying took certain property out of an iron chest, and wrote the names of two persons upon the envelope containing it, and declared it to be his intention that they should have such property upon his death, and then returned it to the chest and kept the keys in his own possession, never having made an actual delivery thereof to the parties, or to trustees for them^(d). Nor shall a present absolute gift be [236] considered as of this denomination. To bring it within the class, it must be made to take effect only on the death of the donor^(e). Therefore, the gift of a check on a banker, "Pay to self or bearer, two hundred pounds," and also of a promissory note, being absolute and immediate, was held clearly on that ground to be no *donatio mortis causâ*^(f). But where the donor gave a bill on his banker with an indorsement expressing that it was for the donee's mourning, and giving directions respecting it, the bill was decided to be an appointment in the nature of such donation, since it was for a purpose necessarily supposing death^(g).

Simple contract debts and arrears of rent are incapable of this species of disposition, because there can be no delivery of them^(h).

Whether the delivery of a mortgage deed will amount to such gift of the money due on the security, seems to be an undecided point⁽ⁱ⁾.

(a) *Ibid.* 2 Vez. 440.

(c) *Lawson v. Lawson*, 1 P. Wms. 441.

(b) *Ibid.* 2 Vez. 431.

et vid. *Tate v. Hilbert*, 2 Ves. jun.

(p) *Ibid.* 2 Vez. 444. *Tate v. Hilbert*, 2 Ves. jun. 120.

111.

(i) *Bunn v. Markham*, 1 Holt's Rep. 352. 7 Taunt. Rep. 224.

(n) *Ward v. Turner*, 2 Vez. 436. 442.

(t) *Tate v. Hilbert*, 2 Ves. jun. 120.

(v) *Vid.* 3 P. Wms. 358. in note. S. C.

(s) *Tate v. Hilbert*, 2 Ves. jun. 111.

2 Vez. 436. *Hassell v. Tynte*, Ambl.

4 Bro. Ch. Rep. 286. S. C.

318. 11 Vin. Abr. 178. *Lawson v. Lawson*, 1 P. Wms. 441. *Miller v.*

Miller, 3 P. Wms. 357.

If the donor die, the interest of the donee is completely vested; nor is it necessary that the gift should be proved as part of the will, it operating on the executor as a declaration of trust, and his assent to it is not *requisite*, as in the case of a legacy^(x). [237] But the gift, however regularly made, shall not prevail against creditors^(y).

Such is the interest which the executor, the heir, the successor, the devisee, the remainder-man, the widow, and the donee *mortis causa* of the testator, respectively take in the personal effects.

(x) 2 Bl. Com. 514. Tate *v.* Hilbert,
2 Ves. jun. 120.

(y) 2 Bl. Com. 514. Tate *v.* Hilbert,
2 Ves. jun. 120.

CHAP. VII.

HOW EFFECTS WHICH AN EXECUTOR TAKES IN THAT CHARACTER MAY BECOME HIS OWN.

THE property which an executor takes in his representative capacity may, in certain instances, be converted into his own. As, first, in regard to the ready money left by the testator. On its coming into the hands of the executor, the property in the specific coin must of necessity be altered ; for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value ; and therefore a creditor of the testator cannot by *fieri facias* on a judgment recovered against the executor take such money as *de bonis testatoris* in execution (^a). So, if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation ; and if it be not more than adequate, the chattel by such election shall become his own (^b) : consequently if by such election he acquire the absolute ownership of the chattel, and die, his executor may defend himself [239] in an action of detinue brought for the same by the surviving executor of the first testator.

But if the debt due to him from the testator amount to the full value of all his effects in the executor's hands, there is a complete transmutation of the property in favour of the executor, by the mere act and operation of law : in the former case his election, and in the latter the mere operation of law, shall be equivalent to a judgment and execution, for he is incapable of suing himself (^c). [1]

(^a) Off. Ex. 89. 185. infr.

(^b) Off. Ex. 89. Dy. 187 b. Plowd. (^c) Plowd. 185.

[1] In Pennsylvania, under the Act of 1794, an executor or administrator is not entitled to retain the whole amount of his debt against creditors of an equal

So in the case of a lease of the testator devolved on the executor, such profits only as exceed the yearly value shall, as it has been already stated, be held to be assets: it therefore follows, that if the executor pay the rent out of his own purse, the profits to the same amount shall be his^(d). There are likewise other means of thus changing the property: as if the testator's goods be sold under a *fieri facias*, the executor, as well as any other person, may buy such goods of the sheriff; and in case he does so, the property, which was vested in him as executor, shall be turned into a property in *jure proprio*^(e). [2]

If the executor among the testator's goods find, and take

(d) Off. Ex. 90, 91.

(e) Ibid. 91.

degree: he can only retain *pro rata*, where there is a deficiency of assets. *Ex parte Meason*, 5 Binn. 167.

By the laws of Massachusetts, the rights of the creditors of a deceased debtor are equal, and no one debt has a priority over another, but all are to be paid *pari passu*. *Hays & al. Ex'rs. v. Jackson*, 6 Mass. T. R. 149.

In North Carolina, the executor may retain against creditors of equal degree with himself, but not against those of a higher degree. *Evans v. Norris's Adm.* Haywood's Rep. 411.

[2] If the administrator purchase the estate of the decedent fraudulently, the purchase is void against creditors and heirs. *Sheldon, &c. v Woodbridge*, 2 Root's Rep. 473. In Pennsylvania, he cannot purchase the land of his intestate, sold by order of the Orphan's Court. *Rham v. North*, 2 Yeates, 117. But, it is common for the administrator to purchase by an agent, to convey to such agent, and take a reconveyance. The legality of such a purchase, it is presumed, would depend upon its fairness and good faith.

If an executor purchase the real estate of his intestate at a sheriff's sale, and refuses afterwards to comply with his contract, in consequence of which a second sale is made, he is chargeable with the largest sum at which it was struck off, whether that were at the first or second sale. *Guier v. Kelly*, 2 Binn. 294.

Where executors were authorized to sell land, on giving security to pay the shares devised to the testator's children, and they sold the land, and invested the identical money produced by the sale, together with other funds, in the purchase of other land, and there was evidence of declarations by one of the executors, tending to show that the purchase was in trust for the children, it was held that the circumstances were sufficient to raise a trust for the children in the land thus purchased. *Wallace & al. v. Duffield & al.* 2 Serg. & R. 521.

some, which were not his, and the owner recover damages for [240] them in an action of trespass or trover, in this, as in all similar cases, the goods shall become the trespasser's property, because he has paid for them (^f).

If the grantee of the next presentation to a living die after the church becomes void, and before presentation, his executor shall have the benefit of presenting. Nor shall it be regarded as assets, since it is incapable of being sold (^g). But if in that case a stranger shall present, and procure his clerk to be admitted, damages recovered by the grantee's executor in a *quare impedit* shall be assets (^h).

(^f) Ibid.

(^g) Off. Ex. 73. Shep. Touchst. 496

(^h) Off. Ex. 73

CHAP. VIII.

OF THE INTEREST OF AN ADMINISTRATOR, GENERAL AND SPECIAL—OF A MARRIED WOMAN EXECUTRIX OR ADMINISTRATRIX—OF SEVERAL EXECUTORS OR ADMINISTRATORS—OF THE EXECUTOR OF AN EXECUTOR—OF AN ADMINISTRATOR DE BONIS NON—OF AN EXECUTOR DE SON TORT.

As an administrator has the office and quality of an executor, the interest of the one in the property of the deceased is in all respects the same as that of the other^(a). The interest of special or limited administrators is also, during its continuance, the same as that of an executor^(b); but they are not invested, as will be shown in its proper place, with the same powers and authority as belong to him^(c).

If a married woman be an executrix, or administratrix, the husband has a joint interest with her in the effects of the deceased; such as devolves the whole administration upon him, and enables him to act in it to all purposes, with or without her [242] assent^(d). Therefore it is held that he may surrender or dispose of a term which was vested in her in that capacity, and such surrender or disposition shall be binding upon her^(e). So a gift, or release of any part of the deceased's personal property by the husband alone shall be equally available^(f); but the wife has no right to administer without the husband: and such acts as have been just mentioned, if performed by her without his concurrence, will be of no validity^(g). In case of

^(a) Off. Ex. 259. Off. Ex. Suppl. 48. 5 Co. 83. Blackborough *v.* Davis, 1 P. Wms. 43. vid. Hudson *v.* Hudson, 1 Atk. 460. and Jacomb *v.* Harwood, 2 Vez. 267. and infr.

^(b) 2 Fonbl. 387.

^(c) 11 Vin. Abr. 104, 105. 3 Bac. Abr. 13, 14.

^(d) Yard *v.* Eland, Ld. Raym. 369.

Com. Dig. Admon. D. Wankford v. Wankford, 1 Salk. 306. Off. Ex. 199. Ankerstein *v.* Clarke, 4 Term Rep. 617.

^(e) Thrustout *v.* Coppin, Bl. Rep. 801.

^(f) Yard *v.* Ellard, Salk. 117. Off. Ex. 208.

^(g) Wankford *v.* Wankford, Salk. 306. Off. Ex. 207, 208. Com. Dig. Admon. D. vid. supra, 9.

the husband's death, the interest never having been divested, shall survive to her; but if she die, it shall not survive to the husband, inasmuch as it belonged to him merely in her right, as representative of the deceased (^l). And although, generally speaking, a feme covert cannot make a will without the assent of her husband, yet without his assent she may make a will, and continue the executorship in respect to the property thus vested in her in *autre droit* (ⁱ). Hence, if the wife of A have debts due to her in her own right, and be also executrix to B, and make a will without her husband's assent, appointing an executor, the will, in respect to the goods and credits which belonged to her as the executrix of B, shall be valid, and her executor may prove it in opposition to the husband. But as to the debts due to her in her private capacity, the will shall be [243] void, and the husband may take administration: she shall be considered as dying testate in regard to the property of which she was possessed as executrix, and as intestate in regard to that to which she was entitled in her own right (^k).

If there be several executors, or administrators, they are regarded in the light of an individual person. They have a joint and entire interest in the testator's effects, which is incapable of being divided (^l), and in case of death, such interest shall vest in the survivor (^m).

So also an executor of an executor, in however remote a series, has the same interest in the goods of the first testator, as the first and immediate executor (ⁿ).

An administrator *de bonis non* has also the same interest in such of the effects as remain unadministered, as was vested in the executor, or antecedent administrator.

An executor *de son tort* has no interest whatever in the property, and therefore can maintain no action in right of the deceased (^o).

(^a) Off. Ex. 208. Com. Dig. Baron and Feme, F. 1. Dy. 331.

(^b) 2 Bl. Com. 408. Off. Ex. 199. 3 Bac. Abr. 10. Off. Ex. Suppl. 20.

(^c) Off. Ex. 202.

(^d) Com. Dig. Admon. B. 12. Dy. 23. b. 3 Bac. Abr. 30. Jacomb v. Harwood, 2 Vez. 267, and vid. infr.

(^e) 9 Co. 36. Dy. 160. Eyre v. Countess of Shaftesbury, 2 P. Wms. 121. vid. supra, 37.

(^f) Com. Dig. Admon. G. Off. Ex. 259. 11 Vin. Abr. 240. 4 Burn. Eccl. L. 273. Shep. Touchst. 464.

(^g) 11 Vin. Abr. 215. Parker v. Kitt, 12 Mod. 471, 472. 2 Bl. Com. 507.

[244] But if the executor *de son tort* take out administration, it shall to most purposes qualify the wrong, and vest the same interest in him as in other administrators, and consequently such as shall have relation to the time of the intestate's death (p).

(p) 11 Vin. Abr. 214—217. Parker *v.* land, 2 Ventr. 179. 3 Bac Abr. 25, 26. Kitt, 12 Mod. 471, 472. Kenrick *v.* Curtis *v.* Vernon. 3 Term Rep. 590. Burges, Moore, 126. Pyne *v.* Wool- Ibid. 2. H. Bl. 26.

BOOK III.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

CHAP. I.

OF THE FUNERAL—OF MAKING AN INVENTORY—OF COLLECTING THE EFFECTS.

SECT. I.

Of the funeral.

THE subject now leads me to consider the powers and duties of an executor, or administrator (^a).

And first he is to bury the deceased according to his rank and circumstances (^b). It has been already stated, that an executor, before probate, may perform this pious office (^c) ; and that the performance of it by a stranger shall not constitute him an executor *de son tort* (^d). The expenses attending it shall be allowed in preference to all debts and charges (^e) ; but the executor is not justified in incurring such as are extra- [246] vagant (^f). Nor as against creditors shall he be warranted in more than are absolutely necessary. In strictness, no funeral expenses are allowed in the case of an insolvent estate, except for the coffin, shroud, and ringing the bell, the fees of the parson, clerk, sexton, and bearers ; but not for the pall, or ornaments (^g). Still less shall charges for feasts and entertainments be admitted ; and indeed in any case they seem in-

(^a) 8 Co. 136.

tor, pl. 172. Dr. & Stud. Dial. 2. c. 10.

(^b) Offley v. Offley, Prec. Chan. 27.

(^f) 2 Bl. Com. 508.

Com. Dig. Admon. C.

(^g) Shilleg's Case, Salk. 296. L. of

(^c) Supr. 46.

Ni. Pri. 143. 4 Burn. Eccl. L. 301.

(^d) Ibid. 40.

Off. Ex. 174. Greenside v. Benson,

(^e) 11 Vin. Abr. 432. Br. tit. Execu-

3 Atk. 249. 3 Bac. Abr. 85.

congruous to so mournful an occasion (^h). If the executor neglect the observance of these rules, he will be chargeable with a species of devastation or waste of the testator's property, which shall be prejudicial only to himself, and not to the creditors or legatees (ⁱ).

The executor must also prove the will; or, in case of intestacy, the next of kin must take out administration, within the six months limited by the statute, provided they respectively act (^k).

A memorial and registry are also required by different acts of parliament (^l) of all wills which affect any lands or tenements in the county of York, or Middlesex, excepting copyhold estates, leases at a rack rent, or leases not exceeding twenty-one years, [247] where the actual possession accompanies the lease, and chambers in Serjeant's Inn, the Inns of Courts, and Inns of Chancery.

SECT. II.

Of the making of an inventory by the executor, or administrator.

AN executor, or administrator, before he administers, except by the performance of such acts as cannot be deferred, as disposing of perishable articles (^a), is likewise bound, pursuant to the stat. 21 H. 8. c. 5. passed in affirmance of the ecclesiastical law, to make an inventory of the deceased's personal estate and effects, in the presence of at least two of his creditors, or legatees, or next of kin: and in their default, or absence, of two other honest persons; and the same shall cause to be indented, of which one part shall be delivered in to the ordinary upon oath, and the other part shall remain in the possession of such executor, or administrator. And the ordinary shall not, under

(^b) Off. Ex. 131.

(^l) Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35.

(ⁱ) 2 Bl. Com. 508. Godolph. p. 2.
c. 26. s. 2.

7 Ann. c. 20. 8 Geo. 2. c. 6. vid. 2
Bl. Com. 343

(^k) Vid. supr. 43. 65. 96.

(^a) 4 Burn. Eccl. L. 250. Swinb. p. 6.
s. 8.

the penalty of ten pounds, refuse to take such inventory, when so presented to him^(b). Also, by the stat. 22 & 23 Car. 2. c. [248] 10. as hath been before mentioned^(c), an administrator must enter into a bond, with two or more securities, conditioned, among other things, for his exhibiting into the registry of the court, at or before a day specified, a true and perfect inventory of the goods, chattels, and credits of the deceased come to his possession^(d).

An inventory is thus required for the benefit of creditors, and legatees, or parties in distribution^(e). It must be written or engrossed on paper or parchment duly stamped^(f). It is to contain a full, true and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the donee *mortis causa* of the testator, or intestate^(g). [1] It must also distinguish

(b) 3 Bac. Abr. 45. 4 Burn. Eccl. L. 251.

(c) 3 Bac. Abr. 45. Swinb. p. 6. s. 6.

(e) Supr. 97.

(f) Vid. Append.

(d) 3 Bac. Abr. 46. 11 Vin. Abr. 358.

(g) 2 Bl. Com. 510. 3 Bac. Abr. 47. 4 Burn. Eccl. L. 253, 254.

[1] Although the real estate be assets, when the personal is exhausted, yet the administrator is not bound by the form of the administration bond to inventory the real estate of the intestate. *Henshaw v. Blood & al.* 1 Mass. T. R. 35. *Prescott v. Tarbell*, Ib. 204. *Freeman v. Tarbell*, 11 Mass. T. R. 190. The administration bond has relation to the personal estate only. *Prescott v. Tarbell*, 1 Mass. T. R. 204.

In Connecticut, it is determined to be the duty of the administrator to exhibit to the Court of Probate an inventory of all the estate, real and personal, that he has reason to suppose belongs to the intestate; and the Court of Probate is bound to receive such inventory, although the estate so inventoried be claimed by a third person; because the administrator cannot prosecute his claim until it be inventoried. *Gold's Case*, Kirby, 101.

It is the duty of executors and administrators to make an inventory of the personal estate of their decedent. In some of the states, this is conditioned in the bond of the executors—vide note [4], page 58. It is one of the conditions of the administration bond, that an inventory should be filed within the time specified in the bond, and the bond is forfeited by non-compliance therewith. *Selectmen of Boston v. Boylston*, 4 Mass. T. R. 318.

In Vermont, the inventory being made, the judge of probate appoints a committee of two or more, to make appraisement; from which an appeal may

such debts as are sperate, and those which are doubtful, or desperate^(h). By the executor it must be exhibited within a competent time: what shall be so considered, depends on the discretion of the ordinary, regulated by the distance at which the goods lie from the residence of the executor, and other circumstances⁽ⁱ⁾. An administrator is bound pursuant to the stat. of *Car. 2.* to exhibit his inventory before the ordinary by the time specified in the condition of the bond, and must do so at his peril^(k).

And the judge has authority to cite or summon either of them for such a purpose, not only at the suit of a party, but at his own discretion^(l).

In point of law, nevertheless, it is the duty both of an executor and an administrator, of their own accord^(m), to exhibit an inventory; the former within a reasonable time, the latter at the time limited by the condition of the administration bond. And the courts formerly considered the neglect of this duty in a light unfavourable to the party, especially where there was a deficiency of assets: and although not conclusive against him, yet as exposing him to imputation; and that the omission was the less to be excused, since neither at law nor in equity is the inventory final; it is permitted him to show that the assets

^(h) 4 Burn. Eccl. L. 254. 3 Bac. Abr. 47. L. of Ni. Pri. 140.

⁽ⁱ⁾ 3 Bac. Abr. 47. Swinb. p. 6. s. 8. 4 Burn. Eccl. L. 265.

^(k) 3 Bac. Abr. 47. Archbishop of Canterbury *v.* Wills. Salk. 251.

^(l) Com. Dig. Admon. B. 7. 4 Burn. Eccl. L. 250. 265. Sed vid. Petit *v.* Smith, 5 Mod. 247.

^(m) Stat. 21 Hen. 8. c. 5. Archbishop of Canterbury *v.* Wills. Salk. 251.

be made, within thirty days, by parties interested, to the judge, who then appoints six other persons, who under oath make a new appraisal of the estate, in whole or in part, at the true value thereof in money. And at the valuation thus made, the executor or administrator is held to account for the estate.

When the legacies in a will are specific, or to be ascertained without inventory or account, and the executor be the residuary legatee, if the legatees and creditors can be secured, there can be no occasion for inventory or account. *Gore v. Brazer*, 11 Mass. T. R. 542.

The amount of the inventory of the personal estate may be recovered against an executor, in Massachusetts, where he refuses to account upon oath for such estate. *Glover v. Heath*, 3 Mass. T. R. 258.

come to his hands amount, from unforeseen circumstances, to less than he may have originally stated them^(a). But although such be the legal obligation imposed on an executor or administrator, in every case, to produce an inventory, yet the practice of the spiritual courts seems in this point to have been [250] gradually relaxing: at one period it appears to have been usual for the executor, or administrator, after probate, or administration, to exhibit an inventory, which was considered as authenticated by the general oath he had taken for the due execution of the will, or administration of the effects, and for exhibiting a true inventory. Yet then he was liable to be called upon to exhibit a farther inventory on his special oath, at the suit of a party interested^(b). But according to the practice which at present prevails, neither the executor, nor administrator, in general cases, exhibits any inventory whatsoever, unless he be cited for that purpose in the spiritual court, at the suit of a creditor or legatee, or party in distribution^(c); and in that case he is bound to exhibit an inventory and account^(d); and his former general oath will not be sufficient; but the inventory thus exhibited must be verified by a special oath, either personally, or by virtue of a commission^(e). The court, however, may exercise a discretion as to the sort of inventory it will accept, particularly in complicated cases^(f).

It is, however, the part of a prudent person, who sustains this office, in every case to see that the effects are carefully appraised, and reduced into an inventory, not only because he may be cited hereafter to produce it, but also because a distinct and accurate knowledge of the fund is necessary, as will more clearly appear from the sequel of this work, to direct him in the safe execution of the trust. Indeed, if a party administer without making an inventory, the law will suppose him to have [251] assets for the payment of all the debts and legacies, unless he repel the presumption; whereas if he make an inventory, he shall not be presumed to have more effects of the deceased

(a) 4 Burn. Eccl. L. 252. Orr *v.* Kaines, 2 Vez. 193.

(b) 4 Burn. Eccl. L. 250. 265, 266.

1 Ought. 344.

(c) Ex. relat.

(d) Phillips *v.* Bignell, 1 Phill. Rep. 239. Myddleton *v.* Rushout, ibid. 224.

(e) 4 Burn. Eccl. L. 266.

(f) Reeves *v.* Freeling, 2 Phill. 56.

than are comprised within it, and the proof of any omission is then thrown on the opposite party (s).

But it is not necessary, according to the modern practice, that the appraisement and inventory should be made exactly pursuant to the letter of the statute. If the effects appear to have been appraised fairly, and by persons of repute, and reduced into an inventory, such inventory shall obtain credence, unless it be falsified by the adverse party (t). And an inventory may be dispensed with altogether, if it shall appear clearly to the court to be unnecessary (u). As, where A died possessed of a large personal estate, and appointed his eldest son executor; and, among other bequests, gave his second son two thousand pounds, to be paid at three several payments: The second son cited his elder brother before the judge of the prerogative court where the will was proved, in order to compel him to bring in an inventory; but it appearing that the two first payments had been made, and the third had been tendered, the judge decided, that there was no need of an inventory at the [252] instance of the plaintiff; and the sentence was affirmed by the delegates, first on appeal, and afterwards on a commission of review (v).

On the other hand, the judge will, in special cases, at the instance of a party interested, decree an inventory to be exhibited by the executor, or administrator, before the issuing of the probate, or letters of administration, under seal; and such inventory must also be substantiated by a special oath (w). Also, under particular circumstances, before the granting of the probate, or letters of administration, the court will, on the petition of a party interested, instead of requiring such inventory, issue a commission for the appraisement and valuation of the goods, rights, and credits, and inspection of the bonds, leases, and other writings relative to the personal estate of the deceased, at his house, or elsewhere, on the day specified, with such continuation of time and place as may be necessary (x).

(s) 4 Burn. Eccl. L. 265, 266. Swinb. p. 6. s. 6.

(w) 4 Burn. Eccl. L. 266. 1 Ought. 344.

(t) Ibid. 1 Ought. 344.

(x) 4 Burn. Eccl. L. 266. 1 Ought.

(u) Ibid. 265.

344.

(v) Boone's Case, Raym. 470.

In cases of this nature, there also usually issues a monition to the other party in special, and to all others in general, with whom any of such effects of the deceased remain, requiring them to exhibit the same to the appraisers under such commission, at the time and place appointed for its execution, in order [253] that they may be appraised and inserted in the inventory (^y).

And on such commission being duly executed, the inventory shall be brought in and exhibited, signed by the hands of the appraisers, or two of them at the least, but without the oath of the party (^z).

In such case, also, an inventory is often required on the executor's or administrator's oath, of such goods of the deceased as have been already disposed of (^a). But after an inventory is exhibited, a creditor cannot impeach it in the ecclesiastical court; for the stat. 21 Hen. 8. which requires an executor or administrator to make an inventory, enjoins him only to deliver it on oath into the keeping of the ordinary; and the ordinary is bound to receive the same on its being so presented (^b).

Yet a creditor may state objections to the inventory, which the party is bound to answer upon oath; but no evidence is admissible to contradict the answer. If the creditor be still dissatisfied, he may have recourse to equity for more effectual relief (^c). But where a creditor gave in an allegation, pleading an omission in the inventory, to which the executrix put in a declaration instead of a specific answer, the court held that such creditor was entitled to have a *constat* of the assets that had come to her hands; and admitted the allegation (^d).

[254] By the custom of London, if any man, or woman, free of the city, die leaving an orphan within age, and not married, the mayor and aldermen may compel the executor, or administrator, to appear at a court of orphanage, and exhibit an inven-

(y) 4 Burn. Eccl. L. 266. 1 Ought. 344, 345.

(z) 4 Burn. Eccl. L. 267. 1 Ought. 345.

(^a) 4 Burn. Eccl. L. 267. 1 Ought. 345.

(^b) 4 Burn. Eccl. L. 267. Catchside v. Ovington, Burr. 1922. Hinton v. Parker, 8 Mod. 168. 2 Fonbl. 418. note (^d).

(^c) 2 Fonbl. 418. note (^d).

(^d) Barclay v. Marshall, 2 Phill. Rep. 188.

tory. And in case any debt appear to be outstanding, to give security to the chamberlain to render upon oath a true account of the same when received; and on his refusal may commit him till compliance. Nor shall his having given security to the spiritual court, as above-mentioned, release him from the obligation of the custom (e).

SECT. III.

Of his collecting the effects.

THE next duty of the executor, or administrator, is to collect all the goods and chattels so inventoried. For that purpose, the law invests him with large powers, and authority. As representative of the deceased, we have seen, he has the same property in the effects as the principal had when living; he has [255] also the same remedies to recover them (a). Within a convenient time after the testator's death, or the grant of administration, he has a right to enter the house descended to the heir, in order to remove the goods (b), provided he do so without violence; as, if the door be open, or at least the key be in the door; and, although the door of entrance into the hall and parlour be open, he cannot therefore justify forcing the door of any chamber to take the goods contained in it; but is empowered to take those only which are in such rooms as are unlocked, or in the door of which he shall find the key. He has, also, a right to take deeds and other writings relative to the personal estate out of a chest in the house, if it be unlocked, or the key be in it; but he has no right to break open even a chest. If he cannot take possession of the effects without force, he must desist, and resort to his action (c). On the other hand, if the executor or administrator on his part be remiss in removing

(e) Com. Dig. Guardian, G. 1. 1 Roll. Abr. 550. Luck's Case, Hob. 247.

(a) 2 Bl. Com. 510. Harg. Co. Litt. 209.

(b) Vid. Harg. Co. Litt. 56 b. and supr 46.

(c) Off. Ex. 92, 93. 11 Vin. Abr. 267. Shep. Touchst. 470.

the goods within a reasonable time, the heir may distrain them as damage feasant^(d).

The executor has also a right, on producing the probate at the bank, and causing so much of it as relates to the testator's [256] interests in the several stocks to be entered in the proper offices, according to the acts of parliament which regulate this species of property, to have the same transferred from the testator's name into his own, or to such person as he shall appoint; and even in the case of a specific bequest of stock, the executor is entitled to call upon the bank for a transfer; and on their refusal, they are subject to an action at his suit. It is personal property, and subject to all its incidents^(e). The administrator has the same right, on producing the letters of administration.

The executor or administrator has likewise authority to sell or dispose of the deceased's effects, and convert them into ready money, to answer the purposes of the trust^(f).

He has power to sell^(g), or as it has been held, to mortgage terms of years, or assign mortgaged terms^(h), and to dispose of any of the effects, although, as it seems, specifically given by the will⁽ⁱ⁾, and even in satisfaction of his own private debt^(k). Nor when he has aliened the assets, can a creditor follow them [257] at law; for the demand of a creditor is only a personal demand against the executor in respect of the assets come to his hands, but no lien on the assets. Equity will, indeed, follow assets on voluntary alienations by collusion with the executor; but if the alienation or pledge be for a valuable consideration,

(d) Off. Ex. 93. Plowd. 280, 281. vid. Stodden v. Harvey, Cro. Jac. 204. and Harg. Co. Litt. 56 b.

(e) See stat. 5 W. & Mary, c. 20. The Bank of England v. Moffat, 3 Bro. Ch. Rep. 260. Vid. also Dougl. 524.

(f) 2 Bl. Com. 510. 11 Vin. Abr. 270. Humble v. Bill, 2 Vern. 445. 1 Bro. P. C. 71. Paget v. Hoskins, Gilb. Rep. Eq. 113. Nugent v. Gifford, 1 Atk. 463. Whale v. Booth, 4 Term Rep. 625. in note.

(g) Ewer v. Corbett, 2 P. Wms. 148. Burtling v. Stonard, ib. 150. Barnard.

78. Elliot v. Merriman, 2 Atk. 41. Jacomb v. Harwood, 2 Vez. 265.

(h) Nugent v. Gifford, 1 Atk. 463. Mead v. Ld. Orrery, 3 Atk. 235. sed vid. Bonny v. Ridgard, cited 2 Bro. Ch. Rep. 438.

(i) Ewer v. Corbett, 2 P. Wms. 148. vid. 2 Bro. Ch. Rep. 431.

(k) Nugent v. Gifford, 1 Atk. 463. Mead v. Ld. Orrery, 3 Atk. 235. Jacomb v. Harwood, 2 Vez. 265. Ewer v. Corbett, 2 P. Wms. 149. note 2. vid. 2 Bro. Ch. Rep. 431.

unless fraud be proved, neither law nor equity will defeat it; for a purchaser from an executor has no means of knowing the debts of the testator; and if a court of equity on the subsequent appearance of debts would control such purchasers, all dealings with executors would be dangerous (¹).

An executor is entitled to recover by action, or other legal remedies, or by suit in equity, whatever pertains to such personal estate (^m).

He is also empowered to redeem such chattels as the deceased may have left in pledge (ⁿ).

Temporary administrators, as an administrator *durante absentia*, or *durante minoritate*, or *pendente lite*, have not, as we shall hereafter see, so unlimited an authority to sell or alienate the testator's property. They may dispose *bona peritura* from necessity, and to prevent an irreparable loss to the estate; and on the same principle they may maintain actions to recover the debts of the deceased (^o). But where the widow of an intestate delivered goods back to a creditor in satisfaction of his demand, in an action of trover by the lawful administrator, it was held, that such creditor could not protect his possession, upon the ground of such delivery having been made by one, who had by such intermeddling made herself *executrix de son tort*; no fact appearing to give colour to her having acted in that respect in the character of executrix, except the single act of wrong complained of, in which the defendant participated (^p). [1]

(¹) *Nugent v. Gifford*, 1 Atk. 463.
Mead v. Ld. Orrery, 3 Atk. 237.
Crane v. Drake, 2 Vern. 616. *M'Leod v. Drummond*, 14 Ves. jun. 353. and
S. C. 17 Ves. jun. 152.

(^m) *Vid. supr. 157.*
(ⁿ) *Vid. supr. 164.*
(^o) *Vid. supr. 404.* and *Walker v. Woollaston*, 2 P. Wms. 584.
(^p) *Mountford v. Gibson*, 4 East. 441.

[1] In the state of Pennsylvania, the administrator has power to raise assets by mortgaging the real estate, when the decedent left lawful issue, but not sufficient personal estate to pay his just debts and maintain his children.

CHAP. II.

OF HIS PAYMENT OF DEBTS IN THEIR LEGAL ORDER.

SECT. I.

Of debts due to the crown by record, or specialty.—Of certain debts by particular statutes.

THE disposition of the property when thus collected, and which constitutes assets, is next to be discussed. And, first, I shall treat of the application of the assets in the order prescribed by law. He must, in the first place, pay all funeral charges, and the expenses of proving the will, or of taking out letters of administration (^a). Secondly, he must pay the debts of the deceased, and in such payment he must be careful to observe the rules of priority; for, if he pay those of a lower degree first, on a deficiency of assets, he must answer those of a higher out of his own estate (^b). But if there be a sufficiency of assets for payment of debts, he may pay simple contract debts not bearing interest before specialty debts bearing interest, if not objected to by the specialty creditors, and the legatees are not at liberty to complain of the order of payment (^c). The more [259] clearly to trace the order which the law prescribes for the payment of debts, and which the executor, or administrator, is thus bound at his peril to observe, it is necessary to consider them under a variety of classes.

They are distinguished, then, first, into debts due to the crown by record, or specialty: secondly, certain debts created by particular statutes: thirdly, debts of record in general:

(^a) 2 Bl. Com. 511. Off. Ex. 130, 131.

(^c) Turner v. Turner, 1 Jac. & Walk.

(^b) 2 Bl. Com. 511. Shep. Touchst.

Rep. 39.

fourthly, debts due by specialty: fifthly, debts due by simple contract, first, to the king; and, secondly, to a subject. [1]

[1] The law on this subject being arbitrary in its character, there prevails, as might be expected, much diversity in the established order for the payment of debts, in the several states.

But by the Act of Congress of 1797, if the estate of a deceased debtor in the hands of his executors or administrators be insufficient to pay his debts, the debt due to the United States must be first satisfied.

In Vermont, New Hampshire, Massachusetts, Rhode Island, and Connecticut, if the estate be insolvent, the only case in which the order of payment is material, the following debts have priority, in the order here placed: viz. funeral expenses,—the charges of the last sickness,—rates and taxes,—debts due to the state. Other debts are to be paid *pro rata*.

In Rhode Island, Massachusetts, and New Hampshire, debts due to the United States are first preferred. In the five New England states, a judgment against an executor or administrator does not affect the real estate. In Massachusetts, debts due to a citizen of a foreign country are not recoverable by his executor or administrator for the benefit of his creditors there, to the exclusion of creditors within the state. *Dawes, Judge, &c. v. Boylston*, 9 Mass. Rep. 337. And all the effects of a person deceased are liable in the first instance to those of his creditors who are inhabitants of the state where such effects are situated. *Stevens's Adm. v. Gaylord*, 11 Mass. Rep. 256.

In New York, the distribution of the personal estate is according to the English law; but assets derived from the sale of real estate are distributed by the surrogate as equitable assets in Chancery.

In New Jersey, the estate of the insolvent decedent is distributed *pro rata*, after payment of the physician's bill during the last sickness, the funeral charges, and judgments entered of record during the life of the decedent.

In Pennsylvania, the order of payment is—1. Physic, funeral expenses, and servants' wages—2. Rents not exceeding one year—3. Judgments—4. Recognizances—5. Bonds and specialties—6. All other debts, without regard to their quality, except debts due to the commonwealth, which shall be last paid. In case of a deficiency of assets, then payment is to be made *pro rata*, (but bonds and specialties to be first paid) according to the proportions settled and adjusted by three or more auditors appointed by the Orphan's Court at the instance of the executor or administrator.

Judgments are to be paid *pro rata* from the personal fund. 1 Binn. 221. But from the fund derived from the real estate, they are to be paid according to the priority of their dates. 4 Dall. 450. 454.

Under the Statute of Pennsylvania, it has been determined, that the United States, when a debt is due to them entitled to preference, may avail themselves of it by a suit on the administration bond, although the Act of 1794, which gives the suit, and fixes the order of payment of debts, does not recognize the

To all other debts, of whatever nature, as well of a prior as of a subsequent date, such as are due to the crown by record or specialty claim the precedence (e).

(e) 11 Vin. Abr. 295. 5 Bac. Abr. 79. Cro. Eliz. 793. Com. Dig. Admon. C. Off. Ex. 133. Littleton *v.* Hibbins, 2. Erby *v.* Erby, 1 Salk. 80.

preference. *Commonwealth v. Lewis*, 6 Binn. 266. The order of payment of the debts of a decedent is according to the nature of the debt at the time of his decease. The nature of a debt is not changed, by a judgment against his representatives. *Wootering v. Stewart & al.* 2 Yeates, 483. *Scott v. Ramsay*, 1 Binn. 221. *Prevost v. Nichols*, 4 Yeates. 479. And though executors and administrators may by their *bona fide* acts conclusively define the extent of the claim of different creditors, they cannot vary the vested interest of creditors, nor change the order of payment. *Ibid.* Judgments obtained before a justice of the peace, if filed in the Office of the Common Pleas according to the Act of Assembly, or made known to the administrator before he has paid away the estate, are entitled to the same priority with judgments obtained in a Court of record. *Scott v. Ramsay*, 1 Binn. 254. A recognizance of bail, where the party was fixed for the debt in his lifetime, is entitled to a preference over bond and simple contract debts, under the Acts of 1705 and 1794. *Dorsey v. Tunis & al.* 1 Binn. 254. And a claim against the estate of the decedent for damages on account of breach of articles of agreement under seal, is a *debt of specialty*, and entitled to preference as such. *Ibid.* The wages of servants entitled to priority are the wages of that class of persons who make part of a family, and who are employed to assist in the economy of the house or its appurtenances, and does not extend to workmen or labourers. *Ex parte Meason*, 5 Binn. 167. And a barkeeper is a servant of that class. *Boniface v. Scott*, 3 Serg. & R. 351.

In Delaware, in case demand be made by the creditor within six months after the death of the debtor, all debts due to the inhabitants of the state shall be paid before foreign debts. Subject to this restriction, the order of payment is as follows:—1. Funeral expenses—2. Debts due to the (*Crown and Proprietary*) state—3. Judgments—4. Recognizances and rent—5. Debts due by obligation—6. Debts due by bill—7. Servants' and workmen's wages—8. Accounts of mechanics and others.

In Maryland, the order of payment is, first, judgments or decrees obtained during the lifetime of the decedent, in full, if the estate be sufficient; if not, then *pro rata*. All other claims are admitted to a distribution on an equal footing, without priority or preference. It has been determined, that an administrator in this state must pay all private persons, *without preference*, all debts of the deceased (except judgment debts) contracted with them since 11th of March, 1786. *Murray v. Ridley*, 3 Har. & M'Hen. 171.

In Virginia and Kentucky, priority is given to a claim which a ward, idiot, or lunatic may have upon the estate of the decedent; after payment of which,

Debts secured to the king by specialty are of the same degree with those of record: for by the stat. 33 H. 8. c. 39. it is enacted, that all obligations and specialties taken to the use of the king, shall be of the same nature as a statute-staple (^d). The king, by his prerogative, is to be preferred before other creditors, inasmuch as the law regards the royal revenue as of more

(^d) Off. Ex. 134.

if the assets be insufficient to pay the other debts, they shall be apportioned among the other creditors, without regard to the dignity of debts.

In North Carolina and Tennessee, there is no alteration of the common law on this subject, except by the Act of Assembly of 1786, ch. 4. which makes bills, bonds, and notes, whether with or without seal, and all settled and liquidated accounts, signed by the debtor, of equal dignity.

In South Carolina and Georgia, the executors and administrators are directed to pay the debts in the following order, viz. Funeral and other expenses of the last sickness,—charges of the probate of the will, or of the letters of administration,—debts due to the public,—judgments, mortgages, and executions, the oldest first,—rent,—bonds and other obligations,—and lastly, debts due on open accounts. But no preference shall be given to creditors in equal degree, where there is a deficiency of assets, except in the case of judgments and mortgages that shall be recorded from the time of recording, and executions lodged in the sheriff's office, the oldest of which shall be first paid; or, in those cases, where a creditor may have a lien on any particular part of the estate.

In Alabama, there is no preference given in the payment of debts, except for debts due for the last sickness,—to the state,—or to persons who have paid as security.

In Louisiana, the prescribed order of payment is as follows, viz.—1. Funeral charges—2. Law charges—3. Medical charges—4. Salaries of persons who hired out their services for the year last past—5. Debts due for sustenance for the deceased and his family for the last six months, such as the butcher's and baker's bills. All other debts are then paid, without preference.

In Mississippi, after the payment of physicians' bills and funeral charges, all other debts *bona fide* stand upon the same footing.

In Missouri, the order prescribed for the payment of debts is as follows, viz. 1. Funeral expenses, and of the last sickness—2. Servants' wages—3. Physic, and medical attendance for the last sickness—4. Debts due to the state—5. Judgments rendered against the deceased within one year preceding his death, unless where executions are regularly continued till his decease—6. All other debts, without regard to their quality, *pro rata*.

In Indiana and Illinois, the English law still prevails.

In Ohio, funeral charges, expenses of the last sickness, and costs of administration, are first paid, and all other debts *pari passu*.

importance than any private interest^(e). Therefore, an ex-[260]ecutor, whose testator was indebted by matter of record to the king, may plead to an action brought by a judgment creditor, or any other creditor, that the testator died thus indebted to the crown, and hath not left assets more than to satisfy the same, and such plea shall be valid; but the defendant must shew the record in certain^(f). So if the creditor proceed to sue out execution on a statute-merchant, or staple, the executor, on setting forth this matter, will be relieved on an *audita querela*^(g). But the debts due to the crown, which are so privileged, must be such as are due by matter of record, or by specialty, which, as we have just seen, are of the same nature^(h). And, therefore, sums of money owing to the king on wood sales, sales of tin, or of other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record. Hence, though fines and amercements in the king's courts of record are clearly debts of record, and entitled to such preference, yet amercements in the king's courts baron⁽ⁱ⁾, or courts of his honours, which are not of record, have no such priority; nor have fines for copyhold estates, nor money arising from the sale of estrays within his manors, or liberties: for these are not debts of record. So whatever accrues to the king by attainder, or outlawry, is considered as a debt by simple contract before office found; and, although debts due to the [261] person outlawed, or attainted, be by obligation, or other specialty, and the outlawry or attainder be of record, yet the law does not recognize the king's title before office found: for till then it does not appear by record that any such debt was due to the party^(k).

So if the king's debtor by simple contract be outlawed on mesne process, the debt is not altered in its nature, nor shall it have precedence, as if the outlawry be subsequent to the judgment, and the debt therefore of record^(l). Nor does the prerogative extend to a debt assigned to the king. Therefore it

(e) 3 Bac. Abr. 79. Off. Ex. 133.

(i) 3 Bl. Com. 25.

(f) Off. Ex. 134. Com. Dig. Admon. C. 2.

(k) 3 Bac. Abr. 80. Off. Ex. 134. Com. Dig. Admon. C. 2.

(g) 3 Bac. Abr. 79. Off. Ex. 135.

(l) Com. Dig. Admon. C. 2. Erby v.

(h) 3 Bac. Abr. 79. Off. Ex. 133, 134.

Erby, 1 Salk. 80. 11 Vin. Abr. 291.

was held, where the obligee of a bond, after the death of the obligor, assigned it to the king, that the obligor's executors were warranted in satisfying a judgment recovered against him in his lifetime in preference to the bond^(m). So also the arrears of rent due to the crown, whether it be a fee-farm rent, or a rent reserved on a lease for years, shall, it seems, be regarded in the light of a debt by simple contract⁽ⁿ⁾.

Such is the law in regard to debts due to the crown, by record, or specialty.

Next in order are certain specific debts, which, subsequently to those of which I have been treating, are, by particular statutes, to be preferred to all others; as forfeitures for not burying in woollen, by 30 Car. 2. c. 3.: money due for letters to the post office, by 9 Ann. c. 10.: and money due from the overseers of the poor, by 17 Geo. 2. c. 38^(o).

SECT. II.

Of the debts of record in general.—Of judgments; and herein of decrees.—Of statutes, and recognizances.—Of docqueting judgments.

To these succeed debts of record in general, of which there are two classes: first, judgments in courts of record; and secondly, statutes and recognizances. The former are of a higher nature and of a greater dignity than the latter; for judgments are recovered on judicial proceedings in litigated cases, and in a regular course of justice; and the records of such judgments are entered on public rolls entrusted to the custody of a sworn officer; also judgments confessed by the testator are on the same footing; for though, in point of fact, they are voluntarily acknowledged, yet they, as well as other judgments, are pre-

(^m) Com. Dig. Admon. C. 2. 11 Vin. (ⁿ) 3 Bac. Abr. 80. in note. 2 Bl. Com. Abr. 301. Lane, 65. 511. 1 Burn. Eccl. L. 301.

(^o) 3 Bac. Abr. 80. Off. Ex. 135.

sumed to have been given adversely; the law supposes, *quod judicium redditur in invitum* (^a).

[263] Hence judgments, as well such as were recovered against the testator, as those which were confessed by him, are in a precedent degree to statutes and recognizances; for statutes, and recognizances (of the nature of which I shall more fully speak), are entered into by the consent of the parties; the former, and, till enrolment, the latter, are carried in pockets, or deposited in escritoirs; in short, are in the private keeping of the creditor himself. Nor does priority of the date make any difference in favour of such last-mentioned securities (^b). An executor is obliged to discharge a later judgment, in preference to a statute, or recognition, prior in point of time (^c).

Such is the preference to which judgments, as distinguished from the more private records, are entitled. Nor is this privilege confined to judgments in the courts of Westminster-hall, but extends itself to judgments in all other courts of record; that is to say, courts in cities, or towns corporate, having power by charter or prescription to hold plea of debt above forty shillings; as, in London, Oxford, and other places: for, although in the first instance, such goods only can be taken in execution on those judgments as lie within the jurisdiction of [264] those respective courts; yet, formerly, if the record were removed into the chancery by *certiorari*, and thence by mittimus into one of the superior courts of law, execution might have been had upon the defendant's goods in any county in England (^d); and now, by the stat. 19 Geo. 3. c. 70, any of his majesty's courts of record at Westminster may, on a proper application, cause the records of such judgments to be removed thither, and may issue writs of execution against the persons or effects of the defendants, in the same manner as on judgments obtained in those superior courts. So a judgment in a *pie poudre* court, which is a court of record incident to every fair and market,

(^a) 3 Bac. Abr. 80. Off. Ex. 136. 139. Com. Dig. Admon. C. 2. Roll. Abr. 926. Littleton v. Hibbins, Cro. Eliz. 793.

(^b) 4 Co. 60. 5 Co. 28. Off. Ex. 137.

Hob. 195. 11 Vin. Abr. 292. in note 299. 2 Bl. Com. 160. 341.

(^c) Off. Ex. 137. Com. Dig. Admon. C. 2. 4 Co. 59, 60.

(^d) Off. Ex. 139. Swinb. p. 6. s. 16.

and is the lowest court of justice (^e) known to the law of England, claims the same preference (^f); and, by the above statute, its process, after judgment, shall be aided in the same manner. Nor does the priority of a judgment in any degree depend on the original cause of action; a judgment against the testator on a debt by simple contract is of the same nature as a judgment on a specialty (^g). So if the testator were bound in a recognizance, on which a *scire facias* was brought and judgment given against him in his lifetime, although this judgment be not *quod recuperet*, as in case of actions on debt, but *quod habeat executionem*, yet since execution is the fruit and effect of all [265] judgments, this is in substance of the same nature, and may well be classed as a debt by judgment (^h).

Nor, as between one judgment and another, is priority of time material. The judgment creditor, who first sues out a *scire facias*, must be preferred; but, before such writ be sued out, the executor has it in his election, where there are two judgment creditors, to pay which of them he pleases first; and if each bring a *scire facias* on his judgment, yet the executor may confess either action, at his option, and that although the *scire facias* were brought by the one creditor before the other (ⁱ). So where, after verdict for the plaintiff in *assumpsit*, and before the day in bank, the defendant died, and judgment was entered the next term, pursuant to the stat. 17 Car. 2. c. 8. on *scire facias* brought against the executor, it was held, that the judgment should by relation be regarded as given in the lifetime of the testator, and be payable accordingly (^k). But where the defendant in an action on simple contract, after an interlocutory judgment, died, and on *scire facias* against his administrator, a writ of inquiry issued, and damages assessed, judgment was entered up against the intestate; the court inclined to the opinion, that the judgment, pursuant to the stat. 8 & 9 W. 3.

(^e) 3 Bl. Com. 32.

(^f) 11 Vin. Abr. 297. *Searle v. Lane*, 2 Vern. 89.

(^g) Vid. 3 Bl. Com. 158. 11 Vin. Abr. 299. Com. Dig. Admon. C. 2. Fitz. 76.

(^h) Off. Ex. 139. Com. Dig. Admon.

C. 2. Vid. also *Gomersal v. Aske*, Yelv. 133.

(ⁱ) Off. Ex. 138. 11 Vin. Abr. 299. 301. 2 Fonbl. 2d edit. 401.

(^k) Com. Dig. Admon. C. 11 Vin. Abr. 302. *Burnett v. Holden*, 1 Lev. 277.

1 Mod. 6. S. C

[266] c. 11. ought to have been entered up, not against the intestate himself, but against the representative; and was therefore not pleadable by the administrator to an action brought against him on a bond⁽¹⁾. In like manner, where a defendant died after a writ of inquiry *executed*, and before the return of it, it was adjudged that a *scire facias* lay against his executor, to show cause why the damages assessed should not be recovered^(m); nor in such case shall the judgment, if on simple contract, be preferred to a debt by specialty.

A judgment signed at any time during the term, or the vacation immediately subsequent, relates back to the first day of the term, although the defendant died before the judgment was actually signed; and an execution tested the first day of the term may be taken out upon it against his goods⁽ⁿ⁾. But, if the writ of execution be not tested till after the defendant's death, it is irregular, and, in such case, it is necessary to revive the judgment by *scire facias* against his representative^(o).

If a judgment be kept on foot merely to defraud other creditors, or if there be any defeasance of it in force, such judgment shall not avail to preclude them from their debts^(p).

[267] A judgment *quod computet*, in the obsolete action of account, is of a nature too incomplete to be privileged like other judgments^(q).

A judgment in a foreign country is regarded, in our courts, merely as a debt by simple contract^(r).

Nor, as we have just seen, are judgments against an executor comprehended within the same class as those which are recovered against the testator^(s).

In case a *scire facias* be brought on a judgment, after the executor has exhausted the assets in the discharge of such of the king's debts as are above mentioned, or in the satisfaction

⁽¹⁾ 11 Vin. Abr. 279. Weston *v.* James,

1 Salk. 42. Com. Dig. Pleader. 2 D. 9.

^(m) Goldsworthy *v.* Southcott, 1 Wils. 243.

⁽ⁿ⁾ Bragner *v.* Langmead, 7 Term Rep. 20.

^(o) Heapy *v.* Paris, 6 Term Rep. 368. Vid. also 7 Term Rep. 24.

^(p) 3 Bac. Abr. 81. Off. Ex. 137.

^(q) 11 Vin. Abr. 297. in note. Searle *v.* Lane, 2 Freem. 103. Vid. L. of Ni. Pri. 127.

^(r) 11 Vin. Abr. 291. 2 Fonbl. 460. Dupleix *v.* De Roven, 2 Vern. 540. Walker *v.* Wiffer, Doug. 1.

^(s) Off. Ex. 138.

of other judgments, the defendant may plead generally, that he hath fully administered; and on that plea he may give evidence of those facts, and that will be a sufficient defence^(t). But if an action be brought against an executor on a specialty, or other debt of an inferior nature, and a judgment against the testator remains unsatisfied, it must be pleaded specially^(u).

It is held, that an executor, by bringing a writ of error on a judgment, may postpone to a statute, and the satisfaction of [268] the debt on the statute, pending the writ of error, shall be no *devastavit*, because it was out of his power to withstand the payment of it. The effect of the judgment is by the writ of error totally suspended^(v).

But if no writ of error be brought on the judgment, and a creditor by statute take out execution, the executor is bound to avail himself of his remedy by *audita querela*, in order to secure a fund for the satisfaction of the judgment^(w): and some authorities maintain, that though a writ of error be brought on the judgment, if he fail to resort to an *audita querela*, and suffer the statute to be executed, it will be a *devastavit*^(x).

Nor is an executor bound to take notice of judgments in the Courts of King's Bench, Common Pleas, and Exchequer, unless they are docquitted, that is, abstracted and entered in a book, pursuant to the stat. of 4 & 5 W. & M. c. 20^(y). According to the true construction of that act, a judgment not docquitted is put on a level with simple contract debts^(z). If the executor have notice of the judgment, although not docquitted, he may [269] perhaps be warranted in giving it a preference as a judgment, but if he in that case pay other debts first, he is clearly not liable as on a *devastavit*; thus to charge him it seems that no other than the prescribed notice would be sufficient^(a). And

(t) Off. Ex. 138. *vid.* also *Hickey v. Hayter*, 6 Term. Rep. 388. *Sed vid.* 3 Bac. Abr. 80. and in note.

(u) *Parker v. Atfield*, Ld. Raym. 678. S.C. Salk. 311. 2 Saund. 50.

(v) 11 Vin. Abr. 292. in note. *ibid.* 298. 299. in note. *Bearblock v. Read*, Cro. Eliz. 822. L. of Ni. Pri. 142. Vely. 29.

(w) Off. Ex. 137.

(x) *Ibid.* 137. in note. *vid. Bearblock v. Read*, Cro. Eliz. 822.

(y) 3 Bl. Com. 397.

(z) *Hickey v. Hayter*, administratrix, 6 Term Rep. 384.

(a) Per Lord Kenyon, C. J. *ibid.* *Tanner v. Freeland*, 1 Har. & M'Hen. 34

a plea of *plene administravit* to an action brought on such a judgment will be supported by evidence of payment of debts by specialty, or by simple contract^(b).

On the same principle, a judgment not docquettet according to the directions of the statute cannot be pleaded to an action on simple contract^(c).

But of such judgments, when docquettet, an executor shall be presumed to have cognisance^(d).

The provisions of the statute do not extend to judgments in inferior courts of record; and the executor is still bound to take notice of them at his peril^(e), as he was, before that act, of the judgments of the courts at Westminster^(f).

A decree in a court of equity is, in respect to the course of administering assets, equivalent to a judgment at law, and shall [270] stand in the same order of payment^(g).

In general, actual and express notice of a decree is necessary to make it binding on purchasers. Notice by implication in respect to them is effectual only where a suit is depending. It never was the doctrine, that a decree after a cause is ended shall be constructive notice to purchasers; but it is the pendency of a suit that creates such notice in their case, on the ground that a suit is a transaction in a sovereign court of justice, and every man is presumed to be attentive to what passes there^(h), and also on the policy of preventing the transfer of rights in litigation. But an executor shall be affected with implied notice of a decree obtained against the testator; therefore, where an executor paid a debt due by specialty, before a debt due by

^(b) *Hickey v. Hayter*, 6 Term Rep. 387, 388.

^(c) *Steel v. Roke*, Bos. & Pull. 307.

^(d) 3 Bac. Abr. 83. in note. *Littleton v. Hibbins*, Cro. Eliz. 793. vid. *Harman v. Harman*, 3 Mod. 115. 11 Vin. Abr. 274. 291.

^(e) 11 Vin. Abr. 294. *Herbert's Case*, 3 P. Wms. 117. Off. Ex. 139.

^(f) *Littleton v. Hibbins*, Cro. Eliz. 793.

^(g) 11 Vin. Abr. 301. 3 Bac. Abr. 81. *Shafto v. Powel*, 3 Lev. 355. *Astley*

v. Powis, 1 Vez. 496. *Bligh v. Earl of Darnley*, 2 P. Wms. 621. 3 P. Wms. 401. note (F.) *Morrice v. Bank of England*, Ca. Temp. Talb. 217. *Peploe v. Swinburn*, Bunn. 48. 4 Bro. P. C. 287. See also 2 Fonbl. 412. note (s).

^(h) 2 Fonbl. 156. note (n). *Sorrell v. Carpenter*, 2 P. Wms. 482. *Garth v. Ward*, 2 Atk. 174. *Worsley v. Earl of Scarborough*, 3 Atk. 392. *Walker v. Smallwood*, Ambl. 676.

a decree, of which he had no actual notice, he was decreed to pay it over again out of his own estate (ⁱ).

Although an executor cannot plead or give in evidence at law (^k) a decree of a court of equity, yet he shall be protected, [271] and indemnified in paying due obedience to such decree, and all legal proceedings against him shall be stayed by injunction (^l).

But if the decree be not conclusive of the matters in question, as if it be merely to account, and do not ascertain the sum to be paid, it is analogous to a judgment *quod computet* at law; and that is no complete judgment till the account be stated. Therefore it has been holden, that, pending a bill in equity, and after such decree, an executor may pay any other debt of a higher or an equal nature, in case the assets be legal, although he has no power of so doing as against a final decree (^m).

Next in rank to judgments are recognizances and statutes (ⁿ).

A recognizance is an obligation of record; it may be entered into by the party before a court of record, or magistrate duly authorized, conditioned for the performance of a particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. A recognizance is in most respects like another bond. The chief distinction between them is, that the latter is the creation of a new debt, or an obligation *de novo*; the former [272] is an acknowledgment on record of a prior debt, of which the form is: "That A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C. D. or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated. And in such case, the king, the plaintiff, or C. D. is called the cognizee, as he that enters into the recognizance is called the cognizor. This instrument being either

(ⁱ) 3 Bac. Abr. 81. *Buckle v. Atleo*, 2 Vern. 37. *Searle v. Lane*, 88. *Sorrell v. Carpenter*, 2 P. Wms. 483.

(^k) 11 Vin. Abr. 291. *Stasby v. Powell*, Freem. 333, 334.

(^l) 3 P. Wms. 401, note (F.) *Harding v. Edge*, 1 Vern. 143. *Morrice v. Bank of England*, Ca. Temp. Talb. 217. 4

Bro. P. C. 287. *Martin v. Martin*, 1 Vez. 214.

(^m) *Smith v. Haskins*, 2 Atk. 385. *Worsley v. Earl of Scarborough*, 3 Atk. 392. *Mason v. Williams*, 2 Salk 507. 11 Vin. Abr. 297. 3 Bac. Abr. 83.

(ⁿ) Off. Ex. 140. 2 Bl. Com. 511. Com. Dig. Admon. C. 2. *Philips v. Echard*, Cro. Jac. 8. 35.

certified to, or taken by the officer of some court, is authenticated only by the record of such court, and not by the party's seal (°).

Of securities by statute there are three species: statutes merchant, statutes staple, and recognizances in the nature of statutes staple; and though they are fallen into disuse, yet as they are frequently alluded to in argument, especially on this subject, it seems necessary to give some explanation of them (P). In order to form a distinct notion of their nature, we must recur to different acts of parliament.

By stat. 13 E. 1. called the statute *de mercatoribus*, a merchant is empowered to cause his debtor to appear before the mayor of London, or before some chief warden of a city, or of any other town which the king shall appoint, or before other sufficient men chosen and sworn thereto, when the mayor or [273] chief warden cannot attend, or before one of the clerks, to be appointed by the king, and acknowledge the debt, and the day of payment. And the recognition, that is such acknowledgment, shall be duly entered by a clerk on a double roll, of which one part shall remain with the mayor or chief warden, and the other be deposited with the clerks; one of whom, with his own hand, shall write an obligation, to which writing the seal of the debtor shall be affixed, with the king's seal provided for that purpose; which seal shall be of two pieces, of which the greater piece shall remain in the custody of the mayor or the chief warden, and the other piece in the keeping of such clerk; and, if the debtor do not pay at the day limited, the merchant shall again appear before the mayor and clerk with his obligation; and if it be found by the roll or writing, that the debt was acknowledged, and the day of payment expired, then the statute prescribes certain steps to be taken for the recovery of the debt. This obligation is called a statute merchant.

In regard to the kind of statutes secondly above mentioned, the staple, that is to say, the grand mart for the principal commodities and manufactures of England, was by the stat.

(°) 2 Bl. Com. 341.

Hist. Eng. L. 160. 393. 4 Reeve's Hist.

(P) Vid. 2 Bl. Com. 160. 2 Reeve's Eng. L. 253, 254. Sull. Lect. 155, 156.

27 E. s. held in certain trading towns. And in order that contracts made within the same might be more effectually enforced, that act directs a course similar to a statute merchant, and enacts, that every mayor of the staple shall have power to [274] take recognizances of debts arising on such contracts, in the presence of the constables of the staple, or of one of them; and, that in every staple there shall be a seal remaining in the custody of the mayor, under the seals of the constables; and all obligations which shall be made on such recognizances shall be sealed with that seal. Such obligation is denominated a statute staple.

The benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the stat. 23 H. 8. c. 6. by which it is enacted, that the chief justice of the king's bench, and the chief justice of the common pleas, and in their absence out of term, the mayor of the staple of Westminster, and the recorder of the city of London, jointly, shall have full power and authority to take recognizances or acknowledgments of the king's subjects for the payment of debts according to a form specified; and that every obligation so acknowledged shall be sealed with the seal of the cognizor, and also with such seal as the king shall appoint for the same, and with the seal of one of such justices, and be subscribed by him, or with the seals of such mayor and recorder, with their names subscribed. The statute then directs, that such recognizance shall be duly enrolled in a manner similar to the statute merchant, and provides, that in default of payment of the debt contained in such obligation, the cognizee shall have the same advantages in every respect as in the case of an obligation by statute staple. [275] The obligation, pursuant to this act, is styled a recognizance in the nature of a statute staple.

Such are the three species of statutes.

Although recognizances are entered on the rolls of the king's courts, while statutes are consigned to the custody of the party, and hence are called pocket records (¹), yet both species of securities having been entered into voluntarily and privately, are regarded as equal in their nature, and payable in the same

(¹) 5 Co. 28 b.

order (^r). Nor is it material, in regard to payment by the executor, which of them are prior or subsequent in point of date. Therefore, where there are many cognizees, he may prefer a subsequent to a prior statute or recognition, for they all equally affect the personal estate; although, as to lands, the first in point of time shall have the preference (^s).

If the statute or recognition be defeasanced for the payment of a sum of money at a day certain, although the day be not arrived, yet it is a debt of the same class with other statutes; for it is a present and immediate duty to be discharged at a future period (^t). So, where a testator acknowledged a recognition [276] in the nature of a statute staple, of which the defeasance, after reciting that the testator and cognizee as his surety were bound in an obligation to J. S. for the debt of the testator, with a condition for payment of one hundred pounds at a future day, provided that, if the testator, his executors, or assigns, should pay the one hundred pounds to J. S. at the day, the statute should be void; it was held, that although the day of payment were not yet come, and it were a collateral sum to be paid to a stranger to the statute, and not to the cognizee, and therefore no duty to him, and although the heir of the testator might possibly pay the money at the day, yet, inasmuch as the statute was for the payment of a certain sum of money, with which by intendment the executor would be charged, he might, although before the day of payment, plead the statute in bar to an action of debt on a bond (^u). But if the testator in his lifetime enter into a statute for performance of covenants, and none of them are broken, to an action of debt on specialty the executor cannot plead this statute; for perhaps the covenants may never be broken, and it would be unreasonable to allow him to elude a just debt on a contingency which may never happen (^v). So if it be for payment of money when an infant shall come of age, it shall be no bar to other debts, for the infant may die before that time (^w).

(^r) Off. Ex. 140.

(^u) 11 Vin. Abr. 286. Goldsmith v.

(^s) Off. Ex. 140. 3 Bac. Abr. 81. Roll.

Sydnor, Cro. Car. 362.

Abr. 925. Com. Dig. Admon. C. 2.

(^v) 3 Bac. Abr. 81. 5 Co. 28. Swinb.

Swinb. p. 6. s. 16.

p. 6. s. 16.

(^t) 11 Vin. Abr. 286. 1 Roll. Rep. 405.

(^w) Roll. Abr. 925.

Vaugh. 104.

[277] If a statute be joint and several, the cognizee may elect to sue either the surviving cognizor, or the executor of him who is dead, or both in separate actions. If it be joint only, the survivor alone is liable^(x).

The remedy on the statute is more expeditious than on a recognition; since execution may be taken out on a statute without a *scire facias*, or other suit. But in case of a recognition, if a year pass after the acknowledgment, no execution can be sued out against the party without a *scire facias*; and, in case of his death, although a year be not elapsed, yet a *scire facias* must be sued out against his executor^(y).

If a *scire facias* be sued out on a recognition, an executor shall not defeat it by a voluntary payment of a debt by statute: but if, before judgment on the *scire facias*, execution be sued out against him on the statute, it shall prevail^(z).

A recognition not enrolled shall be considered as a bond, and payable accordingly^(a), the sealing and acknowledgment of it supplying the want of a delivery.

So a statute not regularly taken may be good as an obligation^(b).

[278] Nor are other inferior debts of record to be forgotten; as issues forfeited; fines imposed by the judges at Westminster, or at the assizes; by the justices at quarter sessions; by commissioners of sewers, or of bankrupts, or by stewards of leets, and the like; for all these are debts of record, and so payable by the executor^(c). Of all of which, as well as those by recognition or statute, he is bound to take notice at his peril^(d).

^(x) 11 Vin. Abr. 288. Rogers *v.* Danvers, 1 Mod. 165.

Wms. 334. 2 Vern. 750. S. C.

^(y) Off. Ex. 140.

^(b) Cro. Eliz. Hollingworth *v.* Ascue, 355. 461. 544. 2 Roil. Abr. 149.

^(z) Off. Ex. 140. in note. 11 Vin. Abr. 299. 2 Anderson, 157. pl. 87.

^(c) 11 Vin. Abr. 278. Off Ex. 118.

^(a) Bothomly *v.* Lord Fairfax, 1 P.

^(d) Bothomly *v.* Lord Fairfax, vid. 2 Vern. 750.

SECT. III.

Of debts by specialty,—and herein of rent:—of debts by simple contract.

THE class of debts next in succession are debts by special contracts; as for rent, and also on bonds, covenants, and other instruments under the seal of the party.

Although, in regard to rent, the lessor has a remedy often more efficacious in his own hands by distraining; yet, between a debt by obligation, and a debt by covenant for a sum certain, or for damages on a breach of covenant, and a debt for rent, there is no distinction of rank: they are all debts of the same [279] degree^(a). Nor does it make any difference whether the rent be reserved by lease in writing, or by parol: for in the latter case, the rent arises equally from the profits of the land, and is regarded as a debt by specialty. Nor is the nature of the debt changed by the determination of the lease: the contract remains in the realty, although the right of distress be gone^(b).

But it is necessary to consider rent as distinguished into such as hath been left in arrear by the testator, and such as hath accrued due subsequently to his death.

For rent, which was in arrear in the testator's lifetime, the executor is liable merely in that character; as the testator's debt, he can be sued for it in the *detinet* only, and to such action may plead that he has fully administered^(c): Whereas, for the subsequent rent, the executor is in general regarded as personally responsible. He has no right, as we have already seen^(d), to waive the term, for he must renounce the executorship in *toto*, or not at all; and if he enter on the demised premises, as

(^a) Off. Ex. 146. 2 Bl. Com. 465. 511. Com. Dig. Admon. C. 2. Plumer v. Marchant, 3 Burr 1584. See also Gage v. Acton, 1 Salk 326.

(^b) 3 Bac. Abr. 82. 96. Newport v. Godfrey, 3 Lev. 267. S. C. 2 Ventr. 184. Gage v. Acton, Com. Rep. 67.

Stonehouse v. Ilford, 145. Godfrey v. Newport, Comb. 183. 11 Vitr. Abr. 289. in note. Vid. 3 Bl. Com. 11. Stat. 8 Ann. c 14.

(^c) Lyddall v. Dunlapp. 1 Will. 4. Com. Dig. Admon. B. 1.

(^d) Supr. 143.

by his office he is bound to do, the lessor may charge him as assignee in the *debet* and *detinet* for the rent incurred subsequently to his entry (e).

If the profits of the land exceed the amount of the rent, as [280] the law *prima facie* supposes, such of the profits as are sufficient to make up the rent shall be appropriated to the payment of the lessor, and cannot be applied to any other purpose. Therefore, if in such case the lessor bring an action against the executor for the rent, he cannot plead *plene administravit*, for that plea would confess a misapplication of the profits; since no other payment out of them can be justified till the rent be answered (f). On the other hand, the profits of the land may be inadequate to the rent. In a variety of cases, they may be easily supposed insufficient for a given period, although the lease may on the whole be beneficial. As in respect to rent for the occupation of premises from Michaelmas to Lady-day, especially where almost the whole profit is taken in the summer; as in the case of a lease of tithes, or of meadow grounds, which are usually flooded in the winter (g). So the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value; as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent (h). In these and the like instances, the executor is personally liable only to the extent of the profits, and for such proportion of the rent as shall exceed the profits is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets; and in such case, to an action brought by the lessor against him in the *debet* and *detinet*, he must disclose the matter [281] by special pleading, and pray judgment whether he shall be charged, otherwise than in the *detinet* only, for more than the actual profits (i).

Thus the profits of the land are to be applied by the executor, in the first place, to the discharge of the rent; and if that fund

(e) *Billinghurst v. Speerman*, 1 Salk. 297. 317. Off. Ex. 147.

(g) Off. Ex. 149.

(f) *Buckley v. Pirk*, 1 Salk. 317.

(h) *Ibid.*

(i) *Buckley v. Pirk*, 1 Salk. 317.

should prove insufficient, the residue of the rent is payable out of the general assets, and stands on the same footing with other debts by specialty.

Debts by bond, and other instruments under the seal of the party, are of the same class with debts for rent^(k); and an executor is bound to pay a debt on specialty before a debt by simple contract. But in the distribution of separate property of a married woman as assets after her death, a bond debt is not entitled to priority, for the bond merely as a bond is void^(l). If an agreement be entered into under hand and seal for the purchase of an estate, although the estate on the purchaser's death descend to his heir free from all debts by simple contract, and the personal assets be not more than adequate to pay for the estate, the vendor being a candidate by specialty, may at law charge the purchaser's executor on the covenant to the disappointment of all the simple contract creditors^(m), though equity will marshal the assets in their favour⁽ⁿ⁾. An executor is also bound to pay a debt on specialty before a debt by simple contract, although the bond be not yet due. For the obligation is a present duty, and the condition is but a defeasance of it^(o). Hence it hath been adjudged, that if an action be brought against an executor on a simple contract of the testator, he may plead that his testator entered into a bond payable at a future day, and it shall cover assets to the amount of the sum payable by the condition^(p). But if the testator die indebted to A in one specialty, and to B in another, and of A's debt the day of payment is past, and of B's debt the day of payment is to come, the executor has no right to pay B in preference to A: [282] Yet if A forbear to demand or sue for his debt till the debt of B become payable, then it is in the election of the executor to pay which of them he thinks proper^(p). By the custom of London, if a citizen of London die indebted to another

^(k) Off. Ex. 146.

^(p) 3 Bac. Abr. 81. Buckland *v.*

^(l) Anon. 18 Vez. 258.

Brook, Cro. Eliz. 315. Lemun *v.*

^(m) See Brome *v.* Monck, 10 Ves. jun. 620, 621.

Tooke, 3 Lev. 57. Goldsmith *v.* Sydnar, Cro. Car. 362. Bank of England

⁽ⁿ⁾ Vid. supr. 417.

v. Morrice, Ca. Temp. Hard. 228.

^(o) 11 Vin. Abr. 304. Leon. 187.

(p) Off. Ex. 143. Com. Dig. Admir. C. 2. Swinb. p. 6. s. 16.

citizen by simple contract made within the city, such debt is equal to a debt by specialty, and the payment of it by the executor shall be binding on the obligor of a bond, though a stranger and no citizen (^q).

In the administration of assets, a contingent security, as for example a bond to save harmless, shall not stand in the way of a debt by simple contract (^r). And if, subsequently to the payment of the simple contract debt, the contingency should happen, it seems reasonable that evidence of such payment should be admitted on the executor's plea of *plene administravit* to an action by the specialty creditor (^s).

But where the contingency has taken place, although the debt consequent upon it has not yet been paid, it may be pleaded to an action by a simple contract creditor: As, where the testator had executed a bond to A in two thousand eight hundred pounds, conditioned to indemnify him against another bond for eight [283] hundred pounds, which he had executed jointly with the testator to B for the debt of the testator, in whose lifetime the eight hundred pounds had become due, and were still unpaid; on the executrix's disclosing these facts in a plea to an action of *assumpsit*, and stating that she had administered all, except so much as would satisfy such indemnity bond, it was held to be a sufficient defence (^t).

A bond merely voluntary shall be postponed to simple contract debts which are *bonâ fide* owing; but such bond, if not to the prejudice of creditors, must be paid by the executor, and in preference to legacies. For a bond, however voluntary, transfers a right in the lifetime of the obligor; whereas legacies arise from the will, which takes effect only from the testator's death, and therefore they ought to be postponed to a right created in his lifetime (^u). But an executor has no authority to pay a bond

(^q) 3 Bac. Abr. 82. Snelling *v.* Norton, Cro. Eliz. 409. Noy. 53. Roll. Abr. 557. 5 Co. 82 b. 83. Scudamore *v.* Hearne, Andrew's Rep. 340.

(^r) 11 Vin. Abr. 395. Lancy *v.* Fairechild, 2 Vern. 101. Hawkins *v.* Day, Ambl. 160.

(^s) 11 Vin. Abr. 307. Allen, 40. Sed vid. Goldsb. 142.

(^t) Cox *v.* Joseph, 5 Term Rep. 307.

(^u) 11 Vin. Abr. 304, 305. 1 Eq. Ca. Abr. 84. 143. 3 Bac. Abr. 81, 82. Cray *v.* Rooke, Ca. Temp. Talbot. 156. Loeffs *v.* Lewen, Prec. Ch. 370. Croft *v.* Pyke, 3 P. Wms. 182. Lechmere *v.* Earl of Carlisle, ibid. 222. Lady Cox's Case, ibid. 339. Lassels *v.* Ld. Cornwallis, Finch. Rep. 232.

founded on an usurious contract, or a bond *ex turpi causa*. Such payment will amount to a *devastavit*, as well against legatees as against creditors (^v).

If there be a joint and several obligation, an executor of a deceased obligor may pay the debt out of the estate of the testator, [284] and plead it to other actions by creditors or specialties. But if the obligation be joint only, there the survivor must be charged out of his own estate, and the executors of the deceased obligor are not liable on the instrument (^w).

A demand arising from a covenant, as I have before observed, is of the same nature, whether it be for a specific sum, or whether it sound merely in damages (^x). Thus the grantor's covenant in a marriage settlement for him and his heirs, that the premises are free from incumbrances, shall rank equally with debts on bond (^y). So, to an action on simple contract against an executor, he may plead that the testator entered into certain covenants, and may show the breach of them, and state the amount of the damages incurred, and that he has not assets more than to satisfy them: The plea will be good, although the damages are not liquidated (^z). But where the husband by marriage articles having agreed to settle one thousand five hundred pounds *per annum* on the issue, made a deficient settlement, and devised all his unsettled estates for payment of debts, it was adjudged in equity, that as the settlement was of less than the stipulated value, the widow and infant were to be compensated in damages; but that as the articles made no mention [285] of any specific land, nor contained any covenant in regard to its value, they were to come in after creditors by bond (^a).

If A covenant to pay a sum of money, and die before payment, it may be recovered against his executors (^b): Whereas it has been held, that if he covenant that his executors shall

(^v) 11 Vin. Abr. 307. Brownl. 33. Winchcombe *v.* Bp. of Winchester, Hob. 167. Robinson *v* Gee, 1 Ves. 254.

(^w) 11 Vin. Abr. 288. Rogers *v* Danvers, 1 Mod. 165. S.C. Freem. Rep. 127.

(^x) Plumer *v.* Marchant, 3 Burr. 1380. Freemantle *v.* Dedere, 1 P. Wms. 429.

(^y) 3 Bac. Abr. 81. 11 Vin. Abr. 292

(^z) 11 Vin. Abr. 305. Smith *v.* Harman, 6 Mod. 144.

(^a) 11 Vin. Abr. 290. 305. Whitchurch *v.* Bayntan, 2 Vern. 272.

(^b) Perrot *v.* Austin, Cro. Eliz. 232. Sheph. Epip. 990.

pay the money, no action can be maintained against them, on the principle that it could not be a debt of the testator^(c); but this latter case is of very doubtful authority, for there also the testator was himself bound, and the lien falls upon his representatives, though he himself could not have been sued; and it seems that on either covenant they are equally responsible^(d).

Of this class also are debts by mortgage, and although there be neither bond nor covenant for the payment of the mortgage money, yet it is payable out of the personal assets^(e). But if such debt be paid out of these assets, the other creditors, as well by specialty as on simple contract, and even legatees, are, in case of a deficiency of that fund, entitled in equity to the advantage of the mortgage, to the extent of what was applied in discharge of it out of the personal estate^(f).

[286] Last in the order of payment are debts on simple contract; as on bills and notes not under seal, and verbal promises^(g), or such as are implied in law: Thus where A received with an apprentice the sum of two hundred and fifty pounds, and died about two years afterwards, having employed the apprentice, during that period, in inferior affairs, the executors were decreed in equity, after payment of the debts by specialty, to repay the money as a debt due by simple contract, deducting at the rate of twenty pounds a-year for the maintenance of the apprentice during the time he lived with his master^(h). On contracts of this nature, debts due to the king shall, it seems, be satisfied before debts which are due to subjects⁽ⁱ⁾; the wages also of domestic servants and of labourers appear, with great reason, entitled to a preference; but, with the exception of these,

(c) 11 Vin. Abr. 276. *Perot v. Austin*,
Cro. Eliz. 232. vid. Co. Litt. 386.

(d) *Id.* 3 Burr. 183. 1384.

(e) *Vid. Bristol v. Hungerford*, 2 Vern. 524. Powel on Mortg. 813. *Howell v. Price*, 1 P. Wms. 291. 294. *King v. King*, 3 P. Wms. 358.

(f) *Com. Dig. Chan.* 2 G. 4. *Fletcher v. Stone*, 2 Vern. 273. *Wilson v. Field-*

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ing, ib. 763. S. C. 10 Mod. 426. *Cope v. Cope*, Salk. 449. and vid. infr.

(g) 2 Bl. Com. 465, 466. 511. Off. Ex. 155.

(h) *Soan v. Bowden & Eyles*, M. 30 Car. 2. Ch. Ca. Temp. Finch. 396. 1 Burn. Just. 85.

(i) 3 Bac. Abr. 80. in note.

the executor has a right likewise, in this species of debts, to prefer in payment whichever he pleases (^k).

But where the testator, though in no respect indebted to his brother, had signed a note by which he acknowledged himself indebted to his brother in 5000*l.* and always kept the will in his own custody, and the brother knew nothing of it at the time it was signed, and at the testator's death it was found among his papers, it was held to be a matter merely initiate or intended, and never perfected, and consequently as no debt at all (^l).

With regard to the interest of debts: On a judgment subsequent interest cannot be claimed, but it may be recovered in an action on the judgment (^m). [1] Debts by specialty are payable with interest (ⁿ). And it has been held, that even on demands arising from covenant, although not liquidated, and [287] sounding only in damages, interest is allowed (^o). But interest cannot be recovered on a bond beyond its penalty (^p). Yet to that extent it may be recovered, although not expressly reserved (^q). In respect to interest on simple contract debts, the holder of a bill of exchange or of a promissory note is entitled to recover the money payable upon it with interest (^r) in some cases from the date of the bill or note (^s); but in general, from the time at which it ought to have been regularly paid down to the time when the plaintiff will be entitled to final judgment (^t), and all incidental expenses occasioned by non-

(^k) 2 Bl. Com. 511. 1 Roll. Abr. 927. 11 Vin. Abr. 274. in note. Shep. Epit. 986. Shep. Touchst. 478.

(^l) Disher *v.* Disher, 1 P. Wms. 204.

(^m) Creuze *v.* Hunter, 2 Ves. jun. 162. 165.

(ⁿ) Com. Dig. Chan. 3 S. 1.

(^o) 14 Vin. Abr. Interest. C. 2. Fonbl. 424. sed vid. Sweetland *v.* Squire, 2 Salk. 623.

(^p) Creuze *v.* Hunter, 2 Ves. jun. 168. Sharpe *v.* Earl of Scarborough, 3 Ves. jun. 557. Knight *v.* Maclean, 3 Bro.

Ch. Rep. 496. Grosvenor *v.* Cook, Dick. Rep. 305. Sed vid. Lord Lonsdale *v.* Church, 2 Term Rep. 388.

(^q) Tidd's Prac. B. R. 484, 485. Farquhar *v.* Morris, 7 Term Rep 124. But see 1 Bos. & Pull. 337.

(^r) Bailey on Bills of Exch. 90, 91. Blaney *v.* Hendricks, Bl. Rep. 761. Vid. also Bun. 119. Auriol *v.* Thomas, 2 Term Rep. 52.

(^s) Bailey on Bills of Exch. 91.

(^t) Robinson *v.* Bland, Burr. Rep. 1077.

acceptance, or non-payment^(u). Thus, on a bill or note payable on presentment, interest may be computed from the presentment^(v). And in regard to all other debts of this species, it is the constant practice, either on the contract, or in damages, to give interest for the detention^(w). Book debts, indeed, form an exception to this rule: By the common law they do not of course carry interest, but even on them it may be payable in [288] consequence of the usage of particular branches of trade, or in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it^(x).

If the testator by the will direct that all his debts shall be paid, or make any provision for the payment of his debts in general, this shall revive a debt barred by the statute of limitations, and render it payable by the executor with the others^(y).

The principle here laid down must not now be considered as the law, as in a late case Sir Thomas Plumer, V. C. in an elaborate judgment, after considering all the authorities, decided, that a devise in trust for payment of debts, did not revive a debt, upon which the statute of limitations had taken effect, by the expiration of the time before the testator's death^(z).

SECT. IV.

Of a creditor's gaining priority by legal or equitable process.—

Of notice to an executor of debts by specialty, or simple contract.

SUCH is the order which the law prescribes to an executor for the payment of debts; and although he has a right to pay one creditor in preference to another of the same degree, yet this election may be controlled by legal or equitable proceedings

(^u) Bailey on Bills of Exch. 91. Auriol v. Thomas, 2 Term Rep. 52.

(^v) Blaney v. Hendricks, Bl. Rep. 761.

(^w) Craven v. Tickel, 1 Ves. jun. 63.

(^x) Eddowes v. Hopkins, Dougl. 361.

(^y) Andrews v. Brown, Prec. Ch. 385. Blakeway v. Earl of Strafford, 2 P. Wms. 373.

(^z) Burke v. Jones, 2 Vez. & Bea. 275.

against him, of which he has due notice (^a). Thus, if an action be properly commenced against an executor for any specific debt, it must be preferred by him in payment to others of the same class. Nor, in that case, shall he be warranted in making any voluntary payment of such other debts, to defeat the party of his remedy (^b).

Yet although one creditor commence an action, if another creditor in equal degree commence a subsequent action, and first recover judgment, he must be first satisfied. Hence an executor has it in his election to give a preference by confessing judgment in the action of the one, and pleading such judgment to the action of the other (^c). But if, for the purpose of favouring the claim of one plaintiff in prejudice to that of another, he plead a matter which he knows to be false, the plea shall not be available, as it shall be if the falsity exist not in his own knowledge, as if he plead *non est factum testatoris* (^d).

And even after an interlocutory judgment, and before the execution of a writ of inquiry of damages, he may confess a judgment in an action for a debt in equal degree (^e); for he is in no case bound against his will to defend a suit, and expend the assets in costs, where the case is clear (^f).

According to several adjudged cases (^g), the filing of a bill in equity shall equally prevent the alienation of assets as the filing of an original at law. And, therefore, if a suit in chancery be instituted by a creditor against an executor, he cannot justify a voluntary payment of another creditor of the same order. But a decision to that effect was reversed in the

(^a) Off. Ex. 145.

Goodfellow v. Burchett, 2 Vern. 300.

(^b) 11 Vin. Abr. 296. in note. Good-

Swinb. p. 6. s. 16. 2 Fonbl. 411, 412.

Fonbl. 412. Com. Dig. Admon. C. 2.

Holbird v. Anderson, 5 Term Rep.

3 Bac. Abr. 83. Parker v. Dee, 2

238, 239. 14 Johns. Rep. 446.

Chan. Ca. 201. Solley v. Gower, 2

Parker v. Dee, 2 Chan. Ca. 201. Jolly v. Gower, 2

Vern. 62. Off. Ex. 143, 146. 2 Bl.

Vern. 62.

Com. 512. Ruggles v. Sherman, 14

Smith v. Haskins, 2 Atk. 386.

Johns. Rep. 446.

(^f) Off. Ex. 145.

(^c) Off. Ex. 145. 11 Vin. Abr. 296.

in note 302. Palmer v. Lawson, 1 Lev.

200. Waring v. Danvers, 1 P. Wms.

295. Mellor v. Overton, Carter, 228.

Wright v. Woodward, 1 Vern. 369. 3 Bac. Abr. 81.

(^g) 2 Fonbl. 412. note. S. Joseph v.

Mott, Prec. Chan. 79. Darston v. Earl

of Orford, ib. 188. Wright v. Wood-

ward, 1 Vern. 369. 3 Bac. Abr. 81.

House of Lords, principally on the ground, that a decree cannot be pleaded at law to an action brought against an executor on another debt of equal rank. However, it is now settled, that though a decree in equity cannot be pleaded at law, it is equivalent, in the administration of assets, to a judgment; and, therefore, that if a decree have a real priority in point of time, not by fiction and relation to the first day of term, it shall be preferred, in the order of payment, to subsequent judgments; and the executor, as we have seen, shall be protected in his obedience to such decree, and all proceedings against him at law stayed by injunction^(b). So, pending a suit in equity by one creditor, an executor may confess a judgment at law in favour of another creditor of the same degree⁽ⁱ⁾.

He may also confess a judgment after a decree *quod computet*, if before a final decree. Such decree *quod computet* is analogous to an interlocutory judgment at law; it does not [291] pass in *rem judicatam* until the final decree^(k).

Nor will equity interpose, where, after an action brought by one creditor, an executor confesses judgment to another creditor in equal degree^(l); even although the judgment be given on a *quantum meruit*, without a writ of inquiry to ascertain the damages, if they be so laid in the declaration as not to exceed the debt which is really due^(m). Nor, where a creditor sues an executor at law and in equity at the same time for the same demand, will equity compel him to make his election in which of the courts he will proceed, in case the executor be attempting to prefer other creditors before him by confessing judgments to them, but will merely restrain him from taking out execution on the judgment without leave of the court⁽ⁿ⁾. Nor will a mere demand by the creditor divest the executor of his right of

(^b) *Peploe v. Swinburn*, Bumb. 48. *Darston v. Earl of Orford*, 3 P. Wms. 401. note F. *Forrest*, 217. *Harding v. Edge*, 1 Vern. 143. 2 Vern. *Bucele v. Atleo*, 37. *Searle v. Lane*, 88. *Morrice v. Bank of England*, Ca. Temp. Talb. 217. 4 Bro. P. C. 287.
(ⁱ) *Waring v. Danvers*, 1 P. Wms. 295. Ca. Temp. Talb. 225.

(^k) *Smith v. Eyles*, 2 Atk. 385. Ca. Temp. Talb. 217.

(^l) 3 Bac. Abr. 83. in note. *Waring v. Danvers*, 1 P. Wms. 295.

(^m) 11 Vin. Abr. 298. in note. *Waring v. Danvers*, 1 P. Wms. 295.

(ⁿ) 3 Bac. Abr. 83. *Barker v. Dumeres*, Barnard. Ch. Ca. 277.

giving such preference; that effect can be produced only by the process of a court of justice^(o). Thus the executor is invested with large discretionary powers of preferring one creditor to another of the same class, and in certain cases he may avail himself of the privilege with great propriety, and on solid reasons^(p). But, in general, on a deficiency of assets, it were [292] a more honourable and conscientious discharge of his duty, as far as he has the power of deciding, to pay debts of equal degree in equal proportions^(q).

Nor is an executor warranted merely in the payment of one debt before another of the same order; he may also pay a debt of an inferior nature before one of a superior, of which he has no notice^(r), provided a reasonable time has elapsed after the testator's death; for such payment, if precipitate, would be evidence of fraud.

Of debts of record, supposing, in the case of judgments, they are docquitted, it has been already stated, an executor is bound to take cognisance, as well as of a decree in equity: constructive notice in respect to them is sufficient^(s); but of other species of debts there must be actual notice.

It has been asserted, that such notice must be by suit^(t); but it is perfectly clear, that an executor, if he be by any means apprized of a debt of a higher degree, would not be justified in exhausting the assets in the discharge of one which is inferior; yet, unless he had some notice of the former, he incurs no risk [293] by the payment, after a competent time, of the latter. Hence it has been held, that an executor may plead a judgment recovered against him on a simple contract to an action of debt on a specialty, if he had no notice of such specialty^(u); and may even voluntarily pay, without notice, such inferior debt in

(o) Off. Ex. 145.

88, 89. Sed vid. L. of Ni. Pri. 178.

(r) 11 Vin. Abr. 270. 228. Blundivell

Harman v. Harman, 3 Mod. 115.

v. Loverdell, Sid. 21. Off. Ex. 260.

(t) 3 Bac. Abr. 83. in note. Brooking

(v) Off. Ex. 260, 261. 3 Bl. Com. 19.

v. Jennings, 1 Mod. 175. Vid. Fitz-

(r) 3 Bac. Abr. 82. in note. L. of Ni.

gib. 77.

Pri. 178.

(u) 3 Bac. Abr. 82. in note. Harman

v. Harman, 2 Show. 492. S. C. 3

Mod. 115. L. of Ni. Pri. 178. Davis

v. Monkhouse, Fitzg. 76. Scudamore

v. Hearne, Andrew's Rep. 340.

(s) Dyer, 32. in note. 3 Bac. Abr. 83.

in note. Littleton v. Hibbins, Cro.

Eliz. 793. 2 Vern. Searle v. Lane,

exclusion of the superior, and on a very just principle; for otherwise it might be in the power of an obligee to ruin an executor by suppressing a bond until all the assets were expended in the payment of simple contract debts (^w). And, indeed, after a suit is commenced, yet before he has notice of the plaintiff's demand, he is warranted in paying any other creditor (^x). On the other hand, an executor is not authorized to confess a judgment for a debt of an inferior nature, if he has notice of the existence of a superior. Thus, where an executor to an action on bond pleaded a judgment confessed by him on the preceding day on a simple contract debt, the plea was disallowed, on the ground of its not averring that the defendant had no notice of the plaintiff's demand (^y).

If, ignorant of the existence of a bond, he confess a judgment on a simple contract, and afterwards judgment be given against him on the bond, he is bound, however insufficient the assets, [294] to satisfy both the judgments, for he might have pleaded the first if he had not had assets for both (^z). In like manner a judgment must be satisfied, though recovered against one executor only where there are several (^a), or recovered against one executor by the name of an administrator, or *vice versa* (^b). [1]

(^w) 3 Bac. Abr. 82. Off. Ex. 145. Britton *v.* Bathurst, 3 Lev. 115. Hawkins *v.* Day, Ambl. 162. vid. tam. Greenwood *v.* Brudnish, Prec. Ch. 534.

(^x) Off. Ex. 145. Plowd. 279. Finch. L. 79. Harman *v.* Harman, 3 Mod. 115. L. of Ni. Pri. 178.

(^y) Sawyer *v.* Mercer, 1 Term Rep.

690. Webster *v.* Hammond, 3 Har. & M'Hen. 131.

(^z) Com. Dig. Admon. C. 2. Britton *v.* Bathurst, 3 Lev. 114.

(^a) Com. Dig. Admon. C. 2. Cro. Eliz. 471. 1 Sid. 404. Parker *v.* Amys, 1 Lev. 261.

(^b) Com. Dig. Admon. C. 2. Anon. Cro. Eliz. 646. Parker *v.* Masters, 1 Sid. 404. Sed vid. Anon. Cro. Eliz. 41.

[1] Although in Pennsylvania an executor has no notice of a claim, yet the exhausting of the assets, even after the expiration of a year, in the payment of legacies or distributive shares, in prejudice of a creditor, (without requiring refunding bonds,) would be a *devastavit*. Swearingen *v.* Pendleton, 4 Serg. & R. 394.

An executor must at his peril take notice of a judgment against his testator, in what court soever it may have been rendered; and if he exhaust the assets by paying debts of inferior dignity, must satisfy such judgment *de bonis propriis*. Nimmo, Ex'r. v. The Commonwealth, 4 Hen. & Munf. 57.

CHAP. III.

OF AN EXECUTOR'S RIGHT TO RETAIN A DEBT DUE TO HIM
FROM THE TESTATOR—UNDER WHAT LIMITATIONS.

If a debtor appoint his creditor (^a) to the executorship, he is allowed, both at law and in equity, to retain his debt, in preference to all other creditors of an equal degree. This remedy arises from the mere operation of law, on the ground, that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt. And therefore he may appropriate a sufficient part of the assets in satisfaction of his own demand; otherwise he would be exposed to the greatest hardship; for, since the creditor who first commences a suit is entitled to a preference in payment, and the executor can commence no suit, he must, in case of an insolvent estate, necessarily lose his debt, unless he has the right of retaining. Thus from the legal principle of the priority of such creditor as first commences an action, the doctrine of retainer is a natural deduction; but the privilege is accompanied with this limitation, that he shall not retain his own debt as against those of a higher degree; for the law places him merely in the same situation as if he had sued himself [296] as executor, and recovered his debt, which there could be no room to suppose, during the existence of those of a superior order (^b). As where A, before his marriage, covenanted with B and C to leave them by his will, or that his executors, within

(^a) Supr. 239. *Thynn v. Thynn*, 1 P. Wms. 296. Abr. 922, 923. Plowd. 185. 543. 11

Vin. Abr. 72. 261. Winch. 19. Harg.

(^b) 2 Bl. Com. 511. 3 Bl. Com. 18, 19. Co. Litt. 264. note 1. Vid. infr. 5 Off. Ex. 32. 142, 143. Com. Dig. Admon. C. 2. 3 Bac. Abr. 10. 83. Roll. *Binn.* 167.

An executor cannot defend himself against the suit of a creditor, by showing that before he had notice of the plaintiff's demand, he had paid over the assets to the legatees of the testator. *Kippen & al. v. Carr's Ex'rs.* 4 Munf. 119, 120.

six months after his death, should pay them seven hundred pounds, in trust to pay the interest to his wife for life, and, on her death, to divide the principal among his children, and, in default of children, as he should appoint, and bound himself, his heirs, executors, and administrators, in a penalty for performance; on his dying before his wife, without issue and intestate, it was held, that **B**, in the character of administrator, might retain assets to that amount, during the life of the widow, against a bond creditor, who sued before the six months were elapsed^(c).

So, if **A** and **B** be jointly and severally bound in an obligation, and **A** appoint the executrix of the obligee his executrix, and die leaving assets, she is not compelled to resort to an action against **B**, but is entitled to retain for the debt; in case there be not assets, she has a right to pursue her remedy on [297] the bond against **B**^(d). So, if **A** be indebted to **B** and **C** by several bonds, and die, and **D** take out administration to **A**, and afterwards **B** die, having appointed **D** his executor, he may retain effects, of which he is possessed as administrator of **A**, to satisfy the debt due to him as the executor of **B**^(e). If **A** be indebted in a bond to **B**, and die, having appointed **B** his executor, who, after having intermeddled with the goods, and before probate also dies; although, before his death, he did not expressly elect in what particular effects he would have the property altered; yet it must be presumed that it was his intention to pay his own debt first, and therefore his executor shall have the same power of retaining as belonged to him^(f). So, for a bond executed by the testator to **A**, conditioned for the payment of money to **B**, **B**, it seems, in case he is executor, may retain^(g). So, if administration be granted to a creditor, and afterwards repealed at the suit of the next of kin, such creditor may retain against the rightful administrator^(h). In

(c) *Plumer v. Marchant*, 3 Burr. 1380.

(d) *Com. Dig. Admon. C. 1. Fryer v.*

Gildridge, Hob. 10. 3 Bac. Abr. 10.

3 Kebt. Rep. 166. *Cock v. Cross*, 2

Lev. 73.

(e) 11 Vin. Abr. 261. 2 Brownl. 50.

(f) 11 Vin. Abr. 263. *Croft v. Pyke*,

3 P. Wms. 183, 184. and note B.

(g) *Com. Dig. Admon. C. 2. Semb.*

Raym. 484.

(h) 11 Vin. Abr. 265. *Blackborough*

v. Davis, 1 Salk. 38.

short, wherever an executor might have been sued, or might have paid a debt, he has authority to retain⁽ⁱ⁾.

But where A and B were joint obligors in a bond, the former as principal, the latter as surety, A died, B took out administration to him, and on forfeiture of the bond discharged the [298] debt; it was held that he could not retain, for, by joining in the bond, the debt became his own^(k). Yet in such case, it seems, he might retain for the money paid, as constituting a simple contract debt.

A retainer for a debt may either be given in evidence on the plea of *plene administravit*, or it may be pleaded specially^(l).

An executor may, as we have seen^(m), retain both at law and in equity, for his whole debt, as against other creditors of the same degree⁽ⁿ⁾: but equity will interpose to restrain him from perverting this privilege to the purposes of fraud^(o). Nor will a mere nomination of a creditor to the executorship, if he refuse to act, extinguish his legal remedy for the recovery of his debt^(p). Hence if a creditor be appointed executor with others, he may sue them, especially if he hath not administered^(q). If there be not personal assets, he may sue the heir, where the heir is bound^(r). [1]

(i) Com. Dig. Admon. C. 2. Plumer *v.* Marchant, 3 Burr. 1384.

(o) 3 Bac. Abr. 83. in note. Cock *v.* Goodfellow, 10 Mod. 496.

(k) 11 Vin. Abr. 262. Godb. 149.

(p) Rawlinson *v.* Shaw, 3 Term Rep. 557.

(l) Loane *v.* Casey, Bl. Rep. 965. Plumer *v.* Marchant, 3 Burr. 1383. 11 Vin. Abr. 266. 1 Brownl. 75.

(q) 3 Bac. Abr. 10. in note. Off. Ex. 33.

(m) Supr. 295.

(r) Harg. Co. Litt. 264 b. note 1. Wankford *v.* Wankford, Salk. 304. Off. Ex. 33, 34.

(n) 11 Vin. Abr. 265. in note. Waring *v.* Danvers, 1 P. Wms. 295. Musson *v.* May, 3 Ves. & Bea. 194.

[1] In Pennsylvania, under the Act of 1794, an executor or administrator is not entitled to retain the whole amount of his debt; against creditors in equal degree he can only retain *pro rata*, where there is a deficiency of assets. *Ex parte Meason*, 5 Binn. 176.

In Maryland, "the executor or administrator may not retain for his own claim against the deceased, unless the same be passed by the Orphan's Court; and every such claim shall stand on equal footing with other claims of the same nature."

CHAP. IV.

OF THE PAYMENT OF LEGACIES.

SECT. I.

Legacy what—who may be legatees—who not—legacies general, and specific—lapsed, and vested.

HAVING thus discussed the duty of an executor in regard to the payment of debts according to the order described by law, the payment of legacies, in the next place, demands our attention.

A legacy is a bequest, or gift of personal property by will.

All persons are capable of being legatees, with some special exceptions by common law, and by statute^(a).

To this disability all traitors are subject^(b). By stats. 25 Car. 2. c. 2. and 1 Geo. 1. stat. 2. c. 13, persons required to [300] take the oaths, and otherwise qualify themselves for offices, and omitting to do so, shall be incapable of a legacy. By stat. 9 & 10. Wm. 3. c. 32, persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the holy scriptures to be of divine authority, shall for the second offence be also incapable of any legacy. Likewise, by stat. 5 Geo. 3. c. 27, if artificers going out of the realm to exercise or teach their trades abroad, or exercising their trades in foreign parts, shall not return within six months next after due warning given them, they shall be subject to the same disqualification. And by stat. 25 Geo. 2. c. 6. all legacies given by will or codicil to witnesses of the same are declared void^(b). And the statute extends to wills disposing of personal property only^(c).

(^a) 2 Bl. Com. 512. 4 Burn. Eccl. L. 313. 4 Bac. Abr. 337.

(^b) 2 Bl. Com. 512.

(^b) Vid. 2 Bl. Com. 377. and 4 Burn. Eccl. L. 78.

(^c) Lees v. Summersgill, 17 Ves. jun. 508.

Although a man cannot make a grant to his wife, nor enter into a covenant with her, (for such grant would be to suppose her separate existence, and to covenant with her would be to covenant with himself), yet he may bequeath any thing to her by will, since that cannot take effect till the coverture is determined by death (^d).

An infant in *ventre sa mere* may, as we have seen, be appointed an executor. He is also capable of being a legatee (^e). And a bequest of 2000*l.* each “to all the children of my sister I. G. whether now born or hereafter to be born,” has been held to include all children born after the testator’s death, and an inquiry was directed, what would be a proper sum to be set apart to answer the legacies to future children (^f).

If a legatee is sufficiently described in a will, so that he can be identified, a mistake of his christian name will not make the legacy void: as, where a testator gave a legacy unto *my namesake Thomas, the second son of my brother John*, John had no son of the name of Thomas, but his second son’s name was William, and he was held entitled (^g). And where legacies were given “to the three children of A, the sum of 600*l.* each,” and there were four children all born before the date of the will; the four were held entitled to 600*l.* each, for that it was a mere slip in expression, the meaning being, all children; and the court, conceiving the intention to be to give to each child so much, struck out the specified number (^h).

Under a bequest by an unmarried man “to my children,” parol evidence was allowed to show whom the testator considered in the character of children: and his illegitimate children, having obtained a name by reputation, were admitted to take, though not named in the will (ⁱ). But a bequest “to such

(^d) 1 Bl. Com. 442. Harg. Co. Litt. 112.

(^e) Northey v. Strange, 1 P. Wms. 342. vid. Ellison v. Airey, 1 Ves. 114. Clarke v. Blake, 2 Bro. Ch. Rep. 320. and 1 Cox’s Rep. 248.

(^f) Defflis v. Goldschmidt, 1 Mer. Rep. 417. S. C. 19 Vez. 566.

(^g) Stockdale v. Bushby, Coop. Rep. 229. and 19 Vez. 381. S. C. and see Careless v. Careless, 1 Mer. Rep. 384. same principle decided, and 19 Vez. 601.

(^h) Garvey v. Hebbert, 19 Vez. 125.

(ⁱ) Beachcroft v. Beachcroft, 1 Madd Rep. 430. and see Lord Woodhouselee v. Dalrymple, 2 Mer. Rep. 419.

child or children if more than one as A may happen to be *en-sient* of by me," a natural child of which she was then pregnant, cannot take (k).

Grandchildren in a will may be construed to mean great-grandchildren, unless the intention appears to the contrary (l). The word "relations" in a will means "next of kin" (m). And a bequest by a testator in India "to my nearest surviving relations in my native country Ireland," was held confined to brothers and sisters, living in Ireland or elsewhere (n). [1]

[301] Of legacies there are two descriptions; a general legacy, and a specific legacy (o). The former appellation is expressive of such as are pecuniary, or merely of quantity. Under the denomination of specific legacies two kinds of gifts are included; as, first, where a certain chattel is particularly described, and distinguished from all others of the same species; as, "I give the diamond ring presented to me by A." The second is where a chattel of a certain species is bequeathed without any designation of it as an individual chattel; as, "I give a diamond ring." A bequest in the former mode can be satisfied only by the delivery of the identical subject; and if it be not found among the testator's effects, it fails altogether, unless it be in pawn, when the executor must redeem (p) it for the legatee. But a bequest of the latter description may be

(k) Earle *v.* Wilson, 17 Vez. 528 and see Arnold *v.* Preston, 18 Vez. 288.

(l) Hussey *v.* Berkeley, 2 Eden's Rep. 194. 5 Binn. 601.

(m) Pope *v.* Whitcombe, 3 Merl. Rep. 689.

(n) Smith *v.* Campbell, 19 Vez. 400.

(o) 4 Bac. Abr. 337. 425. 2 Bl. Com. 512.

(p) Ashburner *v.* M'Guire, 2 Bro. Ch. Rep. 113. 4 Bac. Abr. 355. Swinb. part 7. s. 20.

[1] A testator, after giving particular legacies to certain nephews and nieces, and to certain of their children, enumerated by name, and *inter alias* to the widow of one of his nephews, bequeathed all the residue of his estate among "my nephews and nieces of every description mentioned in this will." Held, that the bequest was confined to nephews and nieces, and did not extend to their children, nor to the widow of the deceased nephew. *Lewis v. Fisher & al.* 2 Yeates, 296.

Devise to "the Roman Catholic priest that shall succeed me," and that the said priest shall duly say four masses, &c. Ruled, that such priest must be regularly admitted by the bishop to the discharge of his duties, and must have the pastoral care of his congregation. *Brower's Ex'r's. v. Fromm,* Addis. 362.

fulfilled by the delivery of any thing of the same kind (^q). A legacy of "50*l.* for a ring" is a general pecuniary legacy (^r).

Although the courts are averse from construing legacies to be specific (^s), yet, if the words clearly indicate an intention to separate the particular thing bequeathed from the general property of the testator, they shall have that operation. Hence, under some circumstances, even pecuniary legacies are held to be specific. As a certain sum of money in a certain bag or [302] chest (^t), or in navy or India bills (^u), or the bequest of a sum of money in the hands of A (^v), or of two thousand pounds, the balance due to the testator from his partner on the last settlement between them, if the testator did not draw such money out of trade before he died (^w). So a devise of a rent-charge out of a term for years (^x), and a bequest of a bond, or of the testator's stock in a particular fund, have been thus classed (^y), as likewise has a legacy to be paid out of the profits of a farm, which the testator directed to be carried on (^z). And a bequest of all the testator's personal estate in a certain town has been so considered (^a). [2]

(^q) 2 Fonbl. 374. note O. Purse *v.* Snaplin, 1 Atk. 415. Forrest. 227. Bronson *v.* Winter, Ambl. 57.

(^r) Apreece *v.* Apreece, 1 Ves. & Bea. 364.

(^s) Ellis *v.* Walker, Ambl. 310. Haywood, 228.

(^t) Lawson *v.* Stich, 1 Atk. 508.

(^u) Pitt *v.* Ld. Camelford, 3 Bro. Ch. Rep. 160. Gillaume *v.* Adderley, 15 Ves. jun. 384.

(^v) Hinton *v.* Pinke, 1 P. Wms. 540.

(^w) Ellis *v.* Walker, 1 Ambl. 310.

(^x) Long *v.* Short, 1 P. Wms. 403.

(^y) Ashburner *v.* M'Guire, 2 Bro. Ch. Rep. 108. Forrest. 152. Avelyn *v.* Ward, 1 Ves. 425. 1 Eq. Ca. Abr. 298. Ashton *v.* Ashton, 3 P. Wms. 384.

(^z) Mayott *v.* Mayott, 2 Bro. Ch. Rep. 125. Vid. All Souls' College *v.* Coddington, 1 P. Wms. 598.

(^a) Sayer *v.* Sayer, Prec. Ch. 392. 1 Wash. 58.

[2] Legacy of the dividends and income of \$8000 government stock, to trustees, for the separate use of testator's niece, concluding, "and I also give to the said trustees the principal of the said \$8000, as the same shall be paid off and discharged by the government of the United States, to be held in trust, and applied as before directed." Between the date of the will and the death of the testator, the stock was reduced by the annual sums paid by the government in extinguishment of the public debt. Held, that the legacy was specific, and that the legatee was only entitled to the stock as it was reduced at the death of the testator. *Cuthbert v. Cuthbert*, 3 Yeates, 486.

In like manner the testator may carve specific legacies out of a specific chattel; as where he gives part of the debt due to him from A, it will be a specific legacy (^b). So a bequest of part of the testator's stock in a certain fund shall bear the same construction (^c). But a testator reciting that he had 1500*l.* 5 per cents, gave it to A, and then gave to B all other his stocks that he might be possessed of at his death; the latter bequest is not specific, but is liable to debts in preference to the former (^d).

So where A devised to his wife all his personal estate at B, this was held to be a specific legacy; and the same as if he had enumerated all the particulars there (^e).

On the other hand, a mere bequest of *quantity*, whether of money or of any other chattel, is a general legacy; as of a quantity of stock (^f). And where the testator has not such stock at his death, such bequest amounts to a direction to the executors [303] to procure so much stock for the legatee (^g). But where a testator being indebted on mortgage, and possessed of 5000*l.* stock, by his will gave to A and B all the stock he had in the 3 per cents, *being about* 5000*l.* except 500*l.* which he gave to C; and he devised other specific parts of his property to be sold, and the produce to be applied in discharge of the mortgage; and afterwards the testator sold out 2000*l.* part of the 5000*l.* and paid off the mortgage with it: This was held to have redeemed the legacy *pro tanto*, and that the specific legatees could have no relief from the funds by the will appropriated for payment of the mortgage (^h).

So the purchase to which a general legacy is to be applied will not alter its nature; as where it is directed to be laid out in land (ⁱ). Personal annuities given by will are also general legacies (^k). The same legacies may be specific in one sense,

(^b) Heath *v.* Perry, 3 Atk. 103.

(^c) Sleech *v.* Thorington, 2 Ves. 563. See 2 Fonbl. 374. note O. 1 P. Wms. 540, note 1.

(^d) Parrott *v.* Worsfield, 1 Jac. & Walk. Rep. 594.

(^e) 2 Fonbl. 376. Sayer *v.* Sayer, 2 Vern. 688.

(^f) 1 P. Wms. 540, note. Purse *v.* Snaplin, 1 Atk. 414. Sleech *v.* Tho-

rington, 2 Ves. 562.

(^g) Partridge *v.* Partridge, Ca. Temp. Talbot. 227. Mann *v.* Copland, 2 Madd. Rep. 223.

(^h) Humphreys *v.* Humphreys, 2 Cox's Rep. 184.

(ⁱ) Hinton *v.* Pink, 1 P. Wms. 540.

(^k) Hume *v.* Edwards, 3 Atk. 693. Lewin *v.* Lewin, 2 Ves. 417. 2 Fonbl. 378.

and pecuniary in another; specific as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it⁽¹⁾.

In a case before Lord Camden C. his lordship took the distinction between a legacy of a certain sum due from a particular person, and a legacy of such debt generally, considering the former as a legacy of quantity, the latter as specific^(m). So, in another case, where, after the following bequest, “I give to ‘A one thousand four hundred pounds, for which I have sold ‘my estate this day;” the testator received the whole of that sum, paid it into his banker’s, and drew out one thousand one hundred pounds of the money; this was also held by Lord Bathurst C. to be a legacy of quantity⁽ⁿ⁾. But Lord Thurlow C. disallowed that distinction^(o); and held a legacy of “the principal of A’s bond for three thousand five hundred pounds,” to be a specific legacy, notwithstanding the sum was named.

A legacy to a natural child, of “5,000*l.* sterling, or 50,000 “current rupees,” afterwards described as “now vested in the “East India Company’s bonds,” and sometimes mentioned as “the said sum of 5,000*l.* sterling,” Lord Eldon held not specific but general; as a demonstrative legacy, with a fund pointed out^(p).

Such are the different species of legacies. They are next to be considered as lapsed or vested. It is a general rule, that if a legatee die before the testator, the legacy shall be lapsed^(q), [304] and sink into the residuum of the testator’s personal estate; nor is it an exception that the legacy is left to A, his executors, administrators, or assigns^(r); or to A and his heirs. And although in the bequest of a legacy to A, the testator should

(1) *Smith v. Fitzgerald*, 3 Ves. & Bea. 5.

(m) 2 P. Wms. 330, note 1. *Attorney-General v. Parkin*, Ambl. 566.

(n) *Carteret v. Carteret*, cited 2 Bro. Ch. Rep. 114.

(o) *Ashburner v. McGuire*, 2 Bro. Ch. Rep. 113, 114.

(p) *Gillaume v. Adderley*, 15 Ves. jun. 384.

(q) 4 Bac. Abr. 387. *Elliot v. Davenport*, 1 P. Wms. 83. *Hutcheson v. Hammond*, 3 Bro. C. C. 142. 2 Root. 487. 5 *Binn.* 607. 2 *Yeates*, 525.

(r) *Maybank v. Brooks*, 1 Bro. Ch. Rep. 84. *Tidwell v. Ariel*. 3 Madd. Rep. 403.

express an intention that it should not lapse in case A die before him, this is not sufficient to exclude the next of kin^(s). Yet a bequest may be specially framed, so as to prevent its lapse on such previous death of the legatee, as if in case of the death of A before the testator, other persons are named to take, for instance, A's legal representatives^(t), or the "heir under this will^(u);" or to A, "and failing him by decease before me to his heirs," the legacy on A's so dying shall vest in such nominees^(v). Nor is a legacy to two or more within the rule; for it is settled, that a legacy to several persons is not extinguished by the death of one of them, but shall vest in the survivor^(w). [3]

^(s) Sibley v. Cook, 3 Atk. 572.

^(v) Sibley v. Cook, 3 Atk. 572. See

^(t) Bridge v. Abbot, 3 Bro. C. C. 224.

also Sibthorp v. Moxam, 3 Atk. 580.

^(u) Rose v. Rose, 17 Ves. jun. 347. Vaux v. Henderson, 1 Jac. & Walk. 388. 1 Browne's Rep. 311.

^(w) Northey v. Burbage, Gilb. Rep. 137. Buffor v. Bradford, 2 Atk. 220. Ryder v. Wager, 2 P. Wms. 331.

[3] Where the testator declares his intent that the legacies shall not vest till a *future time*, then all those who were born before the time of distribution shall take, unless there be something in the will to the contrary. *Pemberton v. Purke*, 5 Binn. 507. Where a legacy, payable at a future time, is charged on personal estate only, if the legatee dies before the day of payment, his personal representative will be entitled to it. *Stone & al. v. Massey*, 2 Yeates, 369.

Under a devise of "all the remainder or residue of my estate, real and personal, whatsoever and wheresoever, to my grandchildren, the children of my son A, deceased, to be equally divided between them, and to be enjoyed by them severally and respectively, and their heirs and assigns forever," a posthumous grandchild *in ventre sa mere*, at the *death* of the testator, is entitled to a grandchild's share. *Swift v. Duffield*, 5 Serg. & R. 38.

Devise to the testator's wife, and *after her decease* to trustees, in trust to sell the estate, and divide the money arising from the same "between my children hereinafter named, when they shall attain severally to the age of twenty-one years, or be married, which shall first happen." A, one of the children, attained the age of twenty-one, married, and died in the lifetime of the widow. After her death, the trustees sold. Held, that this was a *vested* legacy in A, and that his administrator was entitled to recover a proportionable part of the proceeds. *Price v. Watkins*, 1 Dall. 8.

Where it may be clearly gathered from the will, that it is the testator's intention that the legacy shall vest, as where he gives the disposal of it to whom the legatee may think proper in her lifetime, the legacy will not lapse, though the legatee die before the legacy is payable. *Stone & al. v. Massey*, 2 Yeates, 363—Even though the legacy be charged upon real estate.

But where two several legacies were given to A and B, and in case A or B died without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, administrators, or assigns, and A died without issue in the testator's lifetime, it was held to have lapsed, the contingency on which it was given over being too remote. Nor does the rule extend to a legacy given over after the death of the first legatee, for in such case the legatee in remainder shall have it immediately^(x). Nor will a legacy lapse by the death of the legatee in the testator's lifetime, if he is to take in the character of trustee^(y).

A bequest by the obligee to one of joint obligors of a debt due on the bond, in these terms—"I remit and forgive to T. W. "the sum of 500*l.* which he stands indebted to me on his bond; "and I direct the said bond to be delivered up to him and cancelled," is merely a personal legacy to T. W., and lapses by his death in the lifetime of the testator; for, notwithstanding the terms in which it is bequeathed, such a bequest does not operate by way of equitable release, or as an extinguishment of the debt. Therefore the surviving co-obligor, and the re-

^(x) 1 And. 33. pl. 82. Miller *v.* Warren, 9 Vern. 207. Perkins *v.* Micklethwaite, 1 P. Wms. 274. Ryder *v.* Wager, 2 P. Wms. 331. Willing *v.* Baine, 3 P. Wms. 113. Lumley *v.* May, Prec. Ch. 37. Hornsby *v.* Hornsby, Moseley, 319. Woodward *v.* Glass-

brook, 2 Vern. 378. 2 Fonbl. 368, note G.

^(y) See Oke *v.* Heath, 1 Ves. 140. Ecles *v.* England, 2 Vern. 468. 2 Fonbl. 369, note G. and H. Earl of Inchiquin *v.* French, 1 Cox's Rep. 1.

In Rhode Island, New Hampshire, and Massachusetts, it is enacted, that when any child, grandchild, or other relation, having a devise of real, or bequest of personal estate, shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, in the same way or manner such devisee would have done, in case he had survived the testator. In New Hampshire and Connecticut, the legacy does not lapse, *in any case*, by the death of a legatee in the life of the testator, if the legatee leave issue.

In Pennsylvania, legacies are restrained from lapse by the death of a legatee, only when given to a child, or other lineal descendant of the testator.

In South Carolina, "If any child die in the lifetime of the father or mother, leaving issue, any legacy given in the last will of such father or mother shall go to such issue, unless such deceased child was equally portioned with the other children by the father or mother when living."

representatives of the deceased legatee, are not discharged from the payment of the money due on the bond^(z).

A legacy is also lapsed, if, before the condition on which it is given by the will be performed, the legatee die, or if he die [305] before it is vested in interest^(a).

So where a bequest was to a son of the testator on his accomplishing his apprenticeship, with the dividends in the meantime for maintenance, and in case he should die *before he accomplished his apprenticeship*, then and in such case to other children, and the legatee died, having accomplished his apprenticeship in the testator's lifetime, it was held a lapsed legacy^(b). And where an estate was devised, charged with two several legacies to A and B, and in case A or B died without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, &c. and A died without issue in the testator's lifetime, the legacy was held to have lapsed, the contingency on which it was given over being too remote^(c).

A legacy given to A to be paid to him, his executors, &c. within twelve months after the death of B, "*in case B shall happen to survive my wife*," and B having died in the life-time of the testator's wife, the latter words were construed with reference only to the time of payment, and not to make void the legacy^(d).

We have already seen, that if a legacy be left to A, *payable to him at a certain age*, it is a vested and transmissible interest in him, *debitum in praesenti*, though *solvendum in futuro*: That it is otherwise, if the legacy be left to him at, or if, or when, he attains such age^(e). The distinction was borrowed from the civil law, and adopted by our courts, not so much from its intrinsic equity, as from its prevailing in the spiritual courts; for since the chancery, as will be hereafter shown, has a con-

^(z) Izon v. Butler, 2 Price Rep. 34. and see Toplis v. Baker, 2 Cox's Rep. 118.

^(a) 2 Fonbl. 368. 1 Bac. Abr. 410.

^(b) Humberstone v. Stanton, 1 Ves. & Bea. 385.

^(c) Massey v. Hudson, 2 Meriv. 130.

^(d) Ibid.

^(e) Vid. supr. 171, 172. 2 Fonbl. 371. note K. Blois v. Blois, 2 Ventr. 347.

2 Ch. 155. Collins v. Metcalf, 1 Vern.

462. Gordon v. Raines, 3 P. Wms.

138. Anon. 2 Vern. 199. Clobberie's

Case, 2 Ventr. 342. Smell v. Dee,

2 Salk. 415. Dawson v. Killet, 1 Bro.

Ch. Rep. 119.

current jurisdiction with them in respect to the recovery of legacies, it is reasonable that there should be a conformity in their decisions, and that the subject should have the same measure of justice, to whatsoever court he may resort. But if such legacies be charged on a real estate, or upon land to be purchased with the residue of a personal estate^(d), in either case they shall equally lapse for the benefit of the heir; for with regard to devises affecting lands, the ecclesiastical courts have no concurrent jurisdiction, and therefore the distinction does not extend to them^(e). If, as I have before stated, the legacy be made to carry interest, though the words "to be paid," or "payable," are omitted, it is vested and transmissible^(f). So [306] if the bequest be to A for life, and after the death of A to B, the bequest to B is vested on the death of the testator, and will not lapse by the death of B in the lifetime of A^(g).

Where a will recited the probability that the legatee was not living, and gave him a legacy upon express condition that he should return to England, and personally claim of the executrix or in the church porch; and that if he should not so claim within seven years, he was to be presumed dead, and the legacy to fall into the residue: the legatee not having returned, and dying abroad within seven years, Lord Eldon held that the legacy was not due; the existence of the legatee, though appearing otherwise, being to be proved by the particular means prescribed, and therefore not within the cases from the civil law, where, the end being obtained, the means were not essential^(h).

^(d) *Harrison v. Naylor*, 2 Cox's Rep. 247. 2 *Yeates*, 369.

^(e) 4 Bac. Abr. 393. 2 Bl. Com. 513. 1 Eq. Ca. Abr. 295. Duke of Chandos *v. Talbot*, 2 P. Wms. 601. 2 Fonbl. 373. note M.

^(f) 2 Fonbl. 371. note K. Clobberie's Case, 2 Ventr. 342. *Pullen v. Serjeant*, 2 Chan. Ca. 155. *Stapleton v. Cheele*, 2 Vern. 673. *Herbert v. Par-*

sons, 2 Ves. 263. *Fonereau v. Fonereau*, 3 Atk. 645.

^(g) 3 Fonbl. 371. note K. Anon. 2 Ventr. 347. *Northey v. Strange*, 1 P. Wms. 342. 566. *Darrel v. Molesworth*, 2 Vern. 378. *Tunstall v. Bracken*, Ambl. 167. *Dawson v. Killet*, 1 Bro. Ch. Rep. 119. 181.

^(h) *Tulk v. Houlditch*, 1 Ves. & Bea. 248.

SECT. II.

Of the executor's assent to a legacy—on what principle necessary—what shall amount to such assent—Assent express or implied—absolute or conditional—has relation to the testator's death—when once made, irrevocable—when incapable of being made.

BUT the bequest of a legacy, whether it be general or specific, transfers only an inchoate property to the legatee. To render it complete and perfect, the assent of the executor is requisite (^a). On him all the testator's personal property is devolved, to be applied, in the first place, to the payment of debts; and, therefore, before he can pay legacies with safety, he is bound to see whether, independently of them, a fund has been left sufficient for the demands of creditors.

In case the assets prove inadequate, the legacies must abate or fail altogether, according to the extent of the deficiency. If, [307] on a failure of assets, he pay legacies, he makes himself personally responsible for the debts to the amount of such legacies. Hence, as a protection to the executor, the law imposes the necessity of his assent to a legacy, before it can be absolutely vested; and such assent, when once given, is considered as evidence of assets, and an admission on the part of the executor that the fund is competent (^b).

If, without the assent of the executor, the legatee take possession of the thing bequeathed, the executor may maintain an action of trespass against him (^c). Nor, even in case of a specific legacy, whether a chattel real or personal be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, has he a right to retain it in opposition to the executor, by whom in such case an action will lie to re-

(^a) 3 Bac. Abr. 84. 2 Bl. Com. 512.

Wash. Rep. 308.

Harg. Co. Litt. 111. Aleyn. 39. Ab-
ney v. Miller, 2 Atk. 598. Mead v.

(^b) Off. Ex. 27, 28. 5 Munf. Rep. 103.
Ibid. 175. 460.

Lord Orrery, 3 Atk. 240. Farrington

(^c) Off. Ex. 27. 223. 3 Bac. Abr. 84.

v. Knightly, 1 P. Wms. 554. Bennet

4 Bac. Abr. 444. Dyer, 254. Keilw.

v. Whitehead, 2 P. Wms. 645. 1

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cover it^(d). Nor has such legatee authority to take possession of the legacy without the executor's assent, although the testator by his will expressly direct that he shall do so; for, if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors^(e). Yet, previously to the assent of the executor, a legatee has such an interest in the thing bequeathed, as that, in case of his death before it be paid or [308] delivered, it shall go to his representative^(f), or, in case of the outlawry of the legatee, shall be subject to the forfeiture^(g).

If A release by will a debt due to him from B, it is the better opinion that the assent of the executor is necessary to give effect to the testator's intention; for although on the one hand it may be alleged that the party to whom the debt is bequeathed must necessarily have it by way of retainer, and that such a clause operates rather as an extinguishment than as a donation, and therefore that it needs no such assent as where there is to be a transfer of the property: yet, on the other hand, a debt so released is regarded, with great reason, in the light of a legacy, and, like other legacies, not to be sanctioned by the executor, in case the estate be insufficient for the payment of debts. But as soon as the executor assents, and not before, it shall be effectually discharged^(h).

With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form; a very slight assent is held sufficient⁽ⁱ⁾. It may be either express or implied, absolute or conditional.

The executor may not only in direct terms authorize the legatee to take possession of the legacy, but his concurrence may [309] be inferred either from indirect expressions or particular acts. And such constructive permission shall be equally available. Thus, for instance, if the executor congratulate the legatee on his legacy; or if a horse is bequeathed to A, and the executor requests him to dispose of it; or if B proposes to

^(d) *Mead v. Lord Orrery*, 3 Atk. 240.
Off. Ex. 222, 223. 2 Hen. & M. 69.

^(e) Off. Ex. 223.

^(f) Off. Ex. 28.

^(g) Vid. Off. Ex. 29.

^(h) Off. Ex. 29, 30. *Rider v. Wager*,

2 P. Wms. 332. *Vid. Fellowes v. Mitchell*, 1 P. Wms. 83. *Sibthorp v. Moxam*, 3 Atk. 580.

⁽ⁱ⁾ *Noel v. Robinson*, 1 Vern. 94. S. C. 460. S. C. 2 Ventr. 358. 4 Bac. Abr.

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purchase the horse of the executor, and he directs **B** to buy it of **A**; or if the executor himself purchase the horse of **A**, or merely offer him money for it; this in either case amounts to an assent by implication to the legacy (^k). So where **A**, the devisee of a term, granted it to the executor, his acceptance of the grant from **A** was held to be an implied permission that the term should be **A**'s to grant (^l). So where **J. S.** seised in fee of a foreign plantation, devised it to **A**, and the executor granted a lease of it for years, reserving rent in trust for **A**, this was adjudged a sufficient assent (^m).

If a term be devised to **A** for life, remainder to **B**, the assent of the executor to the devise to **A** shall operate as an assent to the devise over to **B**, and vest an interest in him accordingly (ⁿ). So an assent to such estate in remainder is an assent to the present estate (^o): For the particular estate and the remainder constitute but one estate (^p). But if a lessee for years bequeath [310] a rent to **A**, and the land to **B**, the executor's assent that **A** should have the rent, is no assent that **B** should have the land, because the rent and the land are distinct legacies; but, under special circumstances, an executor's assent to one legacy may enure to another, as if the case last-mentioned be reversed: The executor's assent that **B** should have the land seems to imply his assent that **A** should have the rent; for the necessity of the executor's assent is established with a view to creditors; now to them the land is equally unproductive, whether it passes to **B** charged with the rent, or not: and also, as it was the testator's intention that **B** should hold the land subject to the rent to **A**, the executor's assent to **B**'s having the land shall, in conformity to the will, be construed an assent to the legacy to **A** (^q). So an assent to a devise of a lease for years is an assent to a condition or contingency annexed to it: As, if there be a devise of a term to the testator's widow, so long as she continues unmarried; and if she marry, then of a rent payable out of the

(^k) 4 Bac. Abr. 445. Off. Ex. 226. Com. Dig. Admon. C. 6. Shep. Touch. 456.

(^l) Off. Ex. 226.

(^m) Noel v. Robinson, 2 Ventr. 358.

(ⁿ) Com. Dig. Admon. C. 6. 10 Co. 47 b. 1 Roll. Abr. 620. Plowd. 545. in note. Adams v. Price, 3 P. Wms. 12.

(^o) Com. Dig. Admon. C. 6.

(^p) Off. Ex. 236.

(^q) Off. Ex. 237.

land; the executor's assent to the devise of the term is an assent to that of the rent in case of the devisee's marriage^(r).

An assent may also be absolute or conditional. If it be of the latter description, the condition must be precedent: As, where the executor assents to the devise of a term, if the devisee will pay the rent in arrear at the testator's death. In that case, if the condition be not performed, there is no assent; but if the assent be on a condition subsequent, as provided the legatee [311] will pay the executor a certain sum annually: such condition is void, and a failure in performing it shall not divest the legatee of his legacy^(s). The state of the fund may require the executor to impose a condition precedent to his payment of the legacy; but if he once part with it, he has no right to clog it with future stipulations, and make that legacy conditional which the testator gave absolutely^(t).

The assent of an executor shall have relation to the time of the testator's death. Hence, if A devise to B his term of years in tithes, in an advowson, or in a house or land, and after the testator's death, and, before the executor's assent, tithes are set out, the church becomes void, or rent from the under-tenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests^(u). So such assent shall by relation confirm an intermediate grant by the legatee of his legacy^(v).

If an executor once assent to a legacy, he can never afterwards retract, and, notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy^(w), and has a lien on the assets for that specific part, and may follow them. And an action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest^(x).

If a term is devised to A, and the executor, before he assents [312] to the devise, take a new lease of the same land to himself for a larger term in possession, or to commence immediately, the term devised is merged, so that it cannot pass to A, although

(r) Com. Dig. Admon. C. 6. 1 Roll.
Abr. 620.

(u) Off. Ex. 249.

(s) Com. Dig. Admon. C. 8. Off. Ex.

(v) Ibid. 250.

238. 4 Bac. Abr. 445. Leon. 130, 131.

(w) Ibid. 227. 4 Bac. Abr. 445. Mead

(t) Off. Ex. 238.

v. Lord Orrery, 3 Atk. 238.

(x) Doe v. Guy, 3 East, 120.

the executor should afterwards assent (^y). An assent to a void legacy is also void (^z).

Such is the nature of an executor's assent to a legacy. We have already seen that he is competent to give it before probate (^a). But if he has not attained the age of twenty-one years, he is incapable by the above-mentioned stat. 38 Geo. 3. c. 87 (^b), of the functions of an executor, and therefore his assent is of no validity (^c).

SECT. III.

When a legacy is to be paid—to whom—of payment in the case of infant legatees—of a married woman—of a conditional payment of a legacy—of payment of interest on legacies—of such payment where the legatees are infants—of the rate of interest payable on legacies.

ON the same principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be compelled to pay it. The period fixed by the civil [313] law for that purpose, which our courts have also prescribed, and which is analogous to the statute of distribution, (as will be hereafter seen,) is a year from the testator's death, during which it is presumed he may fully inform himself of the state of the property (^a).

Legacies to C "and to the heir of his body," to M "to be "secured to her and the heirs of her body," to F "and to her "issue," are absolute legacies: but a legacy to S "and to her "heirs," (say children) S is only entitled for life (^b).

If a legacy to an infant be payable at twenty-one, and he die before, his representative cannot claim it till, in case he had

(y) Off. Ex. 228.

Ex. 224.

(z) Plowd. 526.

(a) 4 Bac. Abr. 434. Smell v. Dee,

(a) Vid. supr. 46.

2 Salk. 415. pl. 2.

(b) Supr. 31.

(b) Crawford v. Trotter, 4 Madd

(c) Vid. Com. Dig. Admon. E. Off.

Rep. 361.

lived, he would have come of age (^c) ; unless it be payable with interest, and then, as we have seen, such representative has a right immediately to receive it (^d). If a legacy be payable out of *land* at a future day, although given with interest in the meantime, if the legatee die before the day of payment, the court will not direct the legacy to be raised until the time for payment arrives, although it will secure a personal fund for a future or contingent legatee (^d). But where a will directed that certain legacies "were to be paid on the land," but expressed neither the time nor the manner in which they should be raised; nor did it appear, as the fact was, that the estate was a reversion: the court held, that as a reversion was as capable of being sold or mortgaged as any other estate, the legacies should be raised and paid with interest from the testator's death, and not from the time of the estate falling in. In case a legacy be left to A at twenty-one, and if he die before twenty-one, then to B; and A die before he attains that age, B shall be entitled to the legacy immediately; for he does not claim under A, but the devise over is a distinct, substantive bequest, to take effect on the contingency of A's dying during his minority (^e).

But where legacies were given to A, B, and C, the three coheiresses of the testator, to be paid at their respective marriages, and if either of them should die, her legacy to go to the survivors, and one of them died unmarried; it was held, that the survivors should not receive the legacy of the deceased before their respective marriages: for the condition, though not [314] repeated, was annexed to the whole, whether it accrued by survivorship, or by the original devise (^f).

Where a legacy was given on condition to be void in case the legatee should succeed to an estate in the event of the death of A without issue of her body, payment was decreed in the

(^c) *Luke v. Alderne*, 2 Vern. 31. Anon. ib. 199. *Papworth v. Moore*, 283.

Chester v. Painter, 2 P. Wms. 336.

(^d) 4 Bac. Abr. 434. in note. *Harrison v. Buckle*, 1 Stra. 238. 480. *Roden v. Smith*, Ambl. 588. *Fonnereau v. Fonnereau*, 1 Vez. 118. *Green v. Pigot*, 1 Bro. Ch. Rep. 105. *Hearle v. Green-*

bank, 1 Vez. 307. *Crickett v. Dolby*, 3 Ves. jun. 10. *Vid. supr.* 171.

(^e) *Gawler v. Standerwick*, 2 Cox's Rep. 15.

(^f) 1 Eq. Ca. Abr. 299, 300. *Laundy v. Williams*, 2 P. Wms. 478.

(^f) *Moore v. Godfrey*, 2 Vern. 620.

lifetime of A, and without security for refunding (^g). And where 30,000*l.* South Sea Annuities were given to trustees in trust to pay the dividends to A, until an exchange of certain lands should be made between him and B, and then the capital to be equally divided between them, and B died before the time limited by the will for making the exchange expired, A was held to be absolutely entitled to the whole legacy (^h).

A legacy was given upon condition "that the legatee should "change the course of life he had too long followed, and give "up low company, frequenting public-houses," &c. The court held that it was such a condition as it would carry into effect; and the evidence not being conclusive, an inquiry was directed, following the words of the bequest (ⁱ). But where an allowance was bequeathed to a feme covert, on condition that she lived apart from her husband, the court held the bequest to be good, and the condition void, as *contra bonos mores* (^k).

A legacy was given to three persons, to be paid as soon as the legatees should arrive in England, or claim the same, provided they should arrive or claim the same within three years after the testator's death; and if they should not, part of the amount of the legacies to go over. The legatee over claiming the legacy, a reference was directed to the Master, to inquire whether the three persons had arrived in England, or claimed the legacy within the three years (^l). Afterwards, one of the legatees arrived in England, and made his claim after the time specified: it was held, the condition was not performed, although the legatee was ignorant till then of the will, or of the testator's death, and no advertisement had been made for legatees (^m).

A legacy was given upon condition that the legatee notified to the executor of the testator his willingness to release certain claims, and he filed his bill. The court held that he had for-

(^g) *Fawkes v. Gray*, 18 Ves. 131.

(^h) *Lowther v. Cavendish*, 1 Eden's Rep. 99.

(ⁱ) *Tattersall v. Howell*, 2 Merl. Rep. 26.

(^k) *Brown v. Peck*, 1 Eden's Rep. 140.

(^l) *Burgess v. Robinson*, 1 Madd. 172. and see *Careless v. Careless*, 1 Merl. Rep. 384. and S. C. 19 Ves. 601.

(^m) *Burgess v. Robinson*, 3 Merl. Rep. 7.

feited his right to the legacy (^a). But where a testator gave to his son for life the interest of a mortgage upon an estate of which he was tenant for life in remainder at the testator's death, and also the furniture in certain houses, upon condition of his executing a release of all claims he might have upon the testator's estate, and of his not contesting the will, though the son lived fourteen months after the testator's death without executing a release, and, upon his first hearing the will, had expressed his dissatisfaction, and an intention of filing a bill; yet the circumstance of his never having paid any part of the interest of the mortgage, his having entered into possession of the furniture, and exercised acts of ownership, together with certain expressions of assent in his letters, were held to be evidence of his acceptance (^b).

A testator authorized his executors, at any time before T. L. attained the age of twenty-six years, to raise, by sale of a sufficient part of certain stock, any sum of money not exceeding 600*l.*, and to pay and apply the same towards the preferment or advancement in life, or other the occasions of T. L. as the said executors should think proper; and at the age of twenty-six he gave the 600*l.* to T. L. absolutely. The executors declined to act, and the court refused to give the 600*l.* to T. L. before twenty-six, without referring it to the Master to inquire whether T. L.'s situation required the 600*l.* or any part thereof to be advanced (^c). [1]

(^a) *Vernon v. Bethell*, 2 Eden's Rep. 110. quis of Granby, 1 Eden's Rep. 489.
 (^b) *Lewis v. Lewis*, 1 Cox's Rep. 162.

(^c) *Earl of Northumberland v. Mar-*

[1] In Vermont and New York, if no time be limited in any last will or testament, for the payment of legacies, the executors have a year for the payment. And no action can be brought against any executor or administrator, until the expiration of one year from the time of proving the will or taking out letters of administration.

In Rhode Island, no action can be brought against the executor or administrator within one year after the will shall be proved, except for medicine and attendance in the last sickness, and funeral charges of the decedent.

In Massachusetts, the executor or administrator cannot be compelled to defend any suit instituted within twelve months after his taking on him the trust.

The next object of inquiry is, to whom a legacy shall be paid. And here the executor must be careful to pay it into that hand which has authority to receive it.

It is a general rule, that he has no right to pay it to the father, or any other relation of an infant, without the sanction of a court of equity^(q); and even in the case of an adult child, such payment is not good, unless it be made by the consent of the child, or be confirmed by his subsequent ratification^(r).

Cases occur where an executor has, with the most honest intentions, paid the legacy to the father of the infant, and has been held liable to pay it over again to the legatee on his coming of age. And although such cases have been attended with many circumstances of hardship in respect to the executor,

^(q) 4 Bac. Abr. 429. 1 Chan. Ca. 245. ^(r) 4 Bac. Abr. 431. Cooper v. Thornton, 3 Bro. Ch. Rep. 97.

unless the same be instituted for recovery of a demand that will not be affected by the insolvency of the estate, or the suit shall be instituted for the purpose of ascertaining a claim that is contested.

In New Jersey, in order to enable the executor or administrator to ascertain the condition of the estate of the decedent, no action at law or in equity shall be brought against the executor or administrator within six months after the decease of the testator or intestate, unless on a suggestion of fraud in the executor or administrator, or for the discovery of assets, or for the physician's bill, funeral charges and expenses, and judgments of record.

In Pennsylvania, if no time for the payment of a legacy be fixed by the will, the executor has one year to pay it in.

In South Carolina and Georgia, twelve months are allowed to the executor or administrator, to ascertain the debts due to and from the deceased, to be computed from the time of the probate of the will or granting letters of administration. In the former state, no action can be brought against the representative for any debt due by the decedent, until nine, and in the latter state until twelve, months after his death.

Where the testator bequeathed a legacy of 500*l.* to A, to be paid her in one year after his decease, and, after other devises and legacies, bequeathed the rest and residue of his estate real and personal to his brothers and sisters, B, C, and D, their heirs and assigns, as tenants in common, provided that his sister E "keep the *whole* in her possession during her widowhood," it was held, that the payment of A's legacy was not to be postponed until after the death of E, but was to be made in one year after the testator's decease. *Hassen-Sleaver v. Tucker*, 4 Binn. 525. Appendix.

yet he has been held responsible, on the policy of obviating a practice so dangerous to the interest of infants, and so naturally productive of domestic discord. The child must in case of such payment either acquiesce, or resort to the father; or, which is in effect the same, institute a suit against the executor, who [315] will of course require the father to refund^(s). Thus legacies of one hundred pounds a-piece were bequeathed to four infants; the executor paid the legacies to the father, and took his receipt for them: when one of the legatees came of age, who was about ten years old at the time of payment, the father told him, that he had such a legacy of his in his hands, but could not pay it immediately, and requested him not to apply to the executor, at the same time promising that he would himself pay it. The son acquiesced for fourteen or fifteen years, during which period his father and he carried on a joint trade, and then became bankrupts. On a commission taken out against the son, this legacy, among other things, was assigned for the benefit of his creditors; and the assignee filed a bill against the executor, for an account and payment of the legacy, when it was decreed accordingly by the Master of the Rolls, but without interest; and the decree affirmed by the Lord Chancellor on an appeal. His lordship, however, on the hardship of the case, ordered the deposit to be divided^(t). It appears from the registrar's book, that in the above case evidence was read, that the testator on his death-bed gave direction that the executor should pay the legacies to the father of the infants, that he might improve the money for their benefit^(u). But al- [316] though that circumstance, if true, rendered the case still harder, yet it could not influence the decision, since the evidence ought not to have been received. It were dangerous to admit proof, that a legacy given to one person was ordered to be paid to another^(w). If the direction had appeared on the face of the

(s) 1 Eq. Ca. Abr. 300. Cooper *v.*

Thornton, 3 Bro. Ch. Rep. 96. 186.

4 Burn. Eccl. L. 321. Helboway *v.*

Collins, Chan. Ca. 245. 3 Ch. Ca. 168.

(t) Dagley *v.* Tolferry, 1 Eq. Ca. Abr.

300. 1 P. Wms. 285. S.C. Gilb Rep.

103. S.C. 4 Burn. Eccl. L. 321. S.C.

Vid. also Philips *v.* Paget, 2 Atk. 81.

and Cooper *v.* Thornton, 2 Bro. Ch. Rep. 96.

(u) 1 P. Wms. 286. in note. Cooper *v.*

Thornton, 3 Bro. Ch. Rep. 96.

(w) Cooper *v.* Thornton, 3 Bro. Ch. Rep. 96. Vid. Maddox *v.* Staines, 2

P. Wms. 421.

will, the decree, doubtless, would have been different^(x). So, where A left a legacy of a hundred pounds to each of the three children of B, and appointed C her executor, leaving him the bulk of her estate, provided he paid those three legacies within a year after her death: The defendant within that period paid into the children's own hands their several legacies; the eldest of whom was then sixteen years, the second fourteen, and the youngest only nine: on her coming of age, they filed their bill against the executor to be paid their respective legacies; suggesting, that their father had embezzled the money, and was insolvent, and that the payment was a fraud: The defendant in his answer denied all knowledge of the money's ever having come to the father's hands: The Lord Chancellor held at first, that as the executor paid these legacies to save a forfeiture of what he himself took under the will, he ought not to pay them over again; but, on farther consideration, conceiving the point to be very doubtful, his lordship recommended a compromise; and the defendant agreeing to pay fifty pounds, to be divided [317] between the three plaintiffs, without costs on either side, they were ordered to release their legacies^(y).

The rule, however, is not so harsh, as that in all possible cases an executor shall be liable to pay over again legacies of infants, which he shall have paid to their parents^(z). Thus, where A bequeathed to J. S. a hundred pounds to be equally divided between himself and his family, the executrix paid the legacy to J. S. who had a wife and seven children, six of whom were adults, and the seventh an infant: Eleven years after the youngest had come of age, and the legacy never having been demanded, they filed their bill against the executrix for the same, insisting that the payment to their father was invalid: It was held, that according to the terms of the will, the legacy was properly paid to J. S.; and that it belonged to him as trustee to divide it: And even on supposition that the payment was wrong, the great laches, and long acquiescence of the plaintiffs, precluded them from all remedy^(a). But where A bequeathed

(x) *Vid. infr.*

(y) *Philips v. Paget*, 2 Atk. 80, 81.

(z) *Ibid.* 81.

(a) *Cooper v. Thornton*, 3 Bro. Ch.

Rep. 96.

his personal estate to trustees, in trust to pay six hundred pounds to an infant, and directed that such of his legatees as might be infants at the time of his decease, should receive interest at the rate of five *per cent.* till their respective legacies should be paid, namely, at their age of twenty-one years; it was holden, that the executors could not justify paying any part of the principal [318] to the infant, or to his use, before that time, except for absolute necessaries (^b).

In case a legacy be too inconsiderable in point of value, to bear the expense of an application to the court of chancery, it seems an executor will be justified in paying it into the hands of the infant, or, which amounts to the same thing, to the father (^c); but in general, he is not warranted in so doing, unless he be clearly authorized by the will. And if a suit be instituted in the spiritual court for an infant's legacy by the father to have it paid into his hands, an injunction (^d), or prohibition (^e), will be granted.

But an executor may discharge himself from all responsibility on this head, by virtue of the stat. 36 Geo. 3. c. 52. § 32, by which it is enacted, that where, by reason of the infancy, or absence beyond the seas, of any legatee, the executor cannot pay a legacy chargeable with duty by virtue of that act, (that is to say) given by any will or testamentary instrument of any person who shall die after the passing of that act, it shall be lawful for him to pay such legacy, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant-general of the court of chancery, to be placed to the account of the legatee, for payment of which the accountant-general shall give his certificate, on production of the certificate of the commissioners of stamps, that the duty thereon hath been duly paid; and such payment into the bank shall be a sufficient discharge for such legacy, which when paid in shall be laid out by the accountant-general in the purchase

(^b) 4 Bac. Abr. 433. Davies *v.* Austen, 3 Bro. Ch. Rep. 178.

(^c) 4 Burn. Eccl. L. 321. 1 Ch. Ca. 245. Philips *v.* Paget, 2 Atk. 81. Com. Dig. Chan. (3 G. 6.) Vid. Seton *v.* Seton, 2 Bro. Ch. Rep. 613. Off.

Ex. 219, 220. Bilson *v.* Saunders, Bunn. 240.

(^d) Rotheram *v.* Fanshaw, 3 Atk. 629. Per Lord Hardwicke, C. arguendo.

(^e) 4 Bac. Abr. 429. in note. Godb. 243.

of 3 per cent. consolidated annuities, which, with the dividends thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on application to the court of chancery by petition, or motion, in a summary way.

But the executor is not bound so to pay the legacy into the bank till the expiration of a year from the testator's death.

Where personal property is bequeathed for life, with remainder over, and not specifically, it is a general rule that it be converted into 3 per cents. subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties (^f).

But this general rule does not attach upon property of a testator, who makes his will, and dies in India, leaving property and a family there, unless the parties come to this country, and then the person in remainder is entitled to have the fund brought here and invested (^g).

It has been decided, that if an executor have a general power to divide a sum of money among children at his discretion, and he make an unreasonable disposition, it will be controlled in a court of equity (^h). As, where A, having two daughters, one by a former marriage, and the other by a second, devised his estate to his wife, to be distributed between his daughters as she should think fit, and she gave a thousand pounds to her own daughter, and only a hundred to the other; an equal distribution was decreed (ⁱ). In like manner where A having appointed his two daughters his executrices, gave them four hundred pounds, to be distributed among themselves and their brothers and sisters, according to their necessity, as the executrices, in their discretion, should think fit; the court settled the [320] distribution, and decreed a double share to one of the children, as standing in greater need of it (^k). But where the testator left a legacy to his wife, and executrix, to be disposed of among their children in such manner as she should think fit; it was held that if she make an inequality, the court will not

(^f) Howe v. Earl of Dartmouth, 7 Ves. jun. 137.

(^g) Holland v. Hughes, 16 Ves. jun. 111.

(^h) 4 Bac. Abr. 340. Gibson v. Kinven, 1 Vern. 66. Thomas v. Thomas, 2

Vern. 513. Alexander v. Alexander. 2 Ves. 640. Upton v. Prince, Ca. Temp. Talb. 72.

(ⁱ) Wall v. Thurborne, 1 Vern. 355.

(^k) Com. Dig. Chan. (4 W. 11.) City of London v. Richmond, 2 Vern. 421.

enter into the motives of it unless it be illusory, and if she give a mere trifle to one of them; and even in that case if the child's misbehaviour has been very gross, it shall not be varied. And it seems now settled, that in cases where an executor has such a discretionary power, he may give a larger share to one of the objects than to another, provided the share of both be substantial, and not illusory or merely nominal⁽¹⁾.

Where a legacy was given to A, but if the executors after named should think it more for his advantage to have it placed out and to pay him the interest for life, as they in their discretion should think fit, and directing that after his decease the said sum should be divided among his children, and for default of children over: one of the executors being dead, and the other having renounced, the legacy was held to be absolute in the legatee^(m).

A testator expressed his will and desire, that one third of the principal of his estate and effects should be left entirely to the disposal of his wife, among such of her relations as she might think proper, after the death of his sisters. The wife died without making any disposition, and it was held a trust for her next of kin at the time of her death⁽ⁿ⁾.

If a legacy be given to a married woman, it must be paid to the husband. So where a legacy was given to a married woman living separate from her husband with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet on a suit instituted by the husband against the executor, he was decreed to pay it over again with interest^(o). It hath also been adjudged, that if the husband and wife are divorced à mensâ et thoro, and the legacy is left to her, the husband alone [321] may release it^(p); and, consequently, to him alone it is

⁽¹⁾ *Maddison v. Andrews*, 1 Ves. 57. vid. also *Alexander v. Alexander*, 2 Ves. 640. *Swift v. Gregson*, 1 Term Rep. 432. *Nisbett v. Murray*, 5 Ves. jun. 149. *Longmore v. Broom*, 7 Ves. jun. 124. and *Butcher v. Butcher*, 9 Ves. jun. 382.

^(m) *Keates v. Burton*, 14 Ves. jun. 434.

⁽ⁿ⁾ *Birch v. Wade*, 3 Ves. & Bea. 198.

^(o) *Palmer v. Trevor*, 1 Vern. 261. 4

Burn. Eccl. L. 332. *L. of Test.* 265.

^(p) 4 Bac. Abr. 433. 1 Roll. Abr. 343. 2 Roll. Abr. 301. S. C. Moore, 665. *Rye v. Fuljambe*, 683. *Stephens v. Totty*, Cro. Eliz. 908. *Stephens v. Totty*, Noy. 45. *Motam v. Motam*, 1 Roll. Rep. 426. S. C. 3 Buls. 264. *Chamberlain v. Hewson*, Salk. 115. pl. 4. S. C. Ld. Raym. 73. S. C. 5 Mod. 69. and 12 Mod. 89.

payable. But the executor, in cases where the husband has made no provision for the wife, may decline paying such legacy, if it amount to the sum of two hundred pounds, unless he will make an adequate settlement on her (^q). Nor will the court of chancery interpose in his favour, but on the same terms (^r); unless the wife appear in court and consent to his receiving it (^s). And if a woman, who is or has been married, is entitled to a legacy, the court expects a positive affidavit, that the legacy has not been in any manner settled, before it will direct payment to her (^t).

Nor does the court confine its interposition in favour of the wife, and compel a provision for her against those persons only, who are seeking to obtain her property by the assistance of the Court; but in extension of the principle of those cases, in which equity restrains the husband from proceeding in the ecclesiastical court, because that jurisdiction cannot enforce a settlement for the wife, will entertain a bill by a married woman against an executor or administrator, and the husband praying for a provision out of a legacy bequeathed to her, or out of a share of an intestate's estate, to whom she is next of kin (^u).

If a legacy be left to the senior six clerk, to be divided between himself and the other six clerks, it seems that it ought to be paid to the senior, and that it would not be incumbent on the executor to make any inquiry respecting the others (^w).

Commissioners of Bankrupt may assign a legacy left to a bankrupt before his bankruptcy (^x); and although it be left after his certificate has been signed by the creditors and com-

(^q) *Lady Elibank v. Montolieu*, 5 Ves. jun. 742. in note.

(^r) *Milner v. Colmar*, 2 P. Wms. 639. *Adams v. Peirce*, 3 P. Wms. 11. *Brown v. Elton*, ib. 202.

(^s) *Willats v. Cay*, 2 Atk. 67. *Milner v. Colmar*, 2 P. Wms. 641. *Parsons v. Dunne*, 2 Ves. 60. *Sed vid. ex parte Higham*, 2 Ves. 579.

(^t) *Hough v. Ryley*, 2 Cox's Rep. 157.

(^u) *Lady Elibank v. Montolieu*, 5 Ves. jun. 737. See *Wright v. Rutter*, 2 Ves. jun. 676. *Meales v. Meales*, 5 Ves. jun. 517. in note. and *Carr v. Taylor*, 10 Ves. jun. 578. and *infr.* 490.

(^w) *Per M. R. arguendo. Cooper v. Thornton*, 3 Bro. Ch. Rep. 99.

(^x) *Cooke's B. L. 371. Com. Dig. Bankrupt (D. 16.) Toulson v. Grout*, 2 Vern. 433.

missioners, if before its allowance by the Lord Chancellor (^y); consequently, in such case the legacy must be paid to the assignees.

Although, as it has been already stated, payment by an executor of a debt by simple contract, before the breach of the condition of a bond, is good, and shall not be impeached by its happening afterwards (^z), yet payment of a legacy under the same circumstances shall not be allowed. It was, indeed, formerly held, that such bond should not hinder the payment of a legacy, because it was uncertain whether the bond would be ever forfeited, but that the executor should pay the legacy conditionally, and take security of the legatee to refund in the event of a forfeiture of the obligation (^a). And in all cases, where a suit was instituted in the spiritual court to compel an executor to pay a legacy without a security from the legatee to refund in case of a deficiency of assets, the court of chancery would grant a prohibition (^b); yet that practice no longer exists. Equity will not now interfere (^c), but will compel a legatee to refund, where the estate proves insufficient, whether security has been given for such a purpose or not (^d).

A legacy must be paid in the currency of the country in which the testator was resident at the time of making the will. Thus it has been decided, that where a party living in Ireland, or in the West Indies, gives legacies by his will generally, they are payable according to the currency of those respective countries (^e). Nor is the case varied by the legatee's residing in England (^f); nor by the testator's having left effects partly [323] here and partly abroad, unless he shall have separated

(^y) *Tredway v. Bourn*, 2 Burr. 716.

(^z) *Supr.* 282.

(^a) 3 Bac. Abr. 84. 1 Roll. Abr. 928.
4 Burn. Eccl. L. 332. *Noel v. Robinson*, 2 Ventr. 358.

(^b) 4 Burn. Eccl. L. 332, 333. *Grove v. Benson*, 1 Chan. Ca. 149. *Noel v. Robinson*, 2 Ventr. 358. S.C. 1 Vern. 93.

(^c) Anon. 1 Atk. 491. *Hawkins v. Day*, Ambl. 160.

(^d) *Noel v. Robinson*, 1 Vern. 93, 94. *Hawkins v. Day*, Ambl. 162.

(^e) *Holditch v. Mist*, 1 P. Wms. 696. note 2. 2 P. Wms. 88, 89. note 1. *Saunders v. Drake*, 2 Atk. 465. *Pearson v. Garnet*, 2 Bro. Ch. Rep. 38. *Malcolm v. Martin*, 3 Bro. Ch. Rep. 50. *Cockerell v. Barber*, 16 Ves. jun 461.

(^f) *Saunders v. Drake*, 2 Atk. 466.

the funds, and charged the legacies on his English property^(g). If he has given some legacies described as *sterling*, and others without such description, the former are payable in sterling money, the latter in the currency of the country where the testator resided^(h). In like manner, if a testator living in England bequeath a legacy, whether of a single sum of money, or of an annuity charged on lands in another country, it shall be paid in England, and in English money, and without any deduction for the expenses of its remittance.⁽ⁱ⁾.

In regard to the payment of interest on a legacy, it was formerly held, that in case of a vested legacy charged on lands yielding immediate profits, and no time of payment mentioned in the will, interest should, in respect of such profits, be made payable from the death of the testator^(k); or that a legacy given out of a personal estate consisting of mortgages bearing interest, or of money in the public funds, the dividends of which are paid half-yearly, should for the same reason carry interest from the same period^(l); or that interest on a specific legacy, where it produces interest, should be computed from the time of the testator's death: It being severed from the rest of his estate, and specifically appropriated for the benefit of the legatee, it should therefore carry interest immediately^(m). But if a legacy were given generally out of the personal estate, and no time specified by the testator, such legacy should carry interest only from the expiration of the year next after his decease, on the principle that the executor might be reasonably allowed that time for the collecting of the effects⁽ⁿ⁾. So it was held, that if a legacy were given, charged on a dry reversion, it should carry interest from a year next after the

^(g) Ibid. Pearson *v.* Garnet, 2 Bro. Ch. Rep. 47.

^(h) Saunders *v.* Drake, 2 Atk. 465. Pearson *v.* Garnet, 2 Bro. Ch. Rep. 38. Malcolm *v.* Martin, 3 Bro. Ch. Rep. 50.

⁽ⁱ⁾ Wallis *v.* Brightwell, 2 P. Wms. 88. Holditch *v.* Mist, 1 P. Wms. 696.

^(k) 4 Bac. Abr. 439. Maxwell *v.* Wettenhall, 2 P. Wms. 26. 2 Bl. Com. 513.

^(l) Maxwell *v.* Wettenhall, 2 P. Wms. 26 and note 2. Lloyd *v.* Williams, 2 Atk. 108. Beckford *v.* Tobin, 1 Ves. 308. Bilson *v.* Saunders, Bunn. 240. Stonehouse *v.* Evelyn, 3 P. Wms. 253.

^(m) Lawson *v.* Stitch, 1 Atk. 508. Sleech *v.* Thorington, 2 Ves. 563.

⁽ⁿ⁾ Maxwell *v.* Wettenhall, 2 P. Wms. 26, 27. Lloyd *v.* Williams, 2 Atk. 108. Shobe *v.* Can., 3 Munf. Rep. 10.

death of the testator; inasmuch as a year was a competent time for a sale^(o). But the rule that the payment of interest should depend on the fund's being productive, or barren, is now exploded; and, generally speaking, interest for a legacy is payable only from a year after the death of the testator: Although he should have left stock only, and no other property, yet now no interest would be given upon legacies bequeathed by him till the end of a year next after his death^(p).

Simple contract debts of another person, charged by the will of a testator upon his real estates, are legacies, and carry interest from the death of the testator at 4 per cent^(q).

If an annuity be given by the will, it shall commence immediately from the testator's death, and, consequently, the first payment shall be made at the expiration of a year next after that event. But if a sum of money be directed by the will to be placed out to produce an annuity, whether that is to be considered as a legacy payable at the end of the year or as an annuity payable from the testator's death, seems to be a doubtful point^(r).

Although the interest of residue goes with the capital, that of particular legacies does not, even supposing it be the payment, and not the vesting, that is postponed. Therefore where no direction is given as to surplus interest, and the capital is made payable at a future time, the surplus interest falls into the residue^(s).

[325] If a legacy, whether vested or not, be payable on a certain day, and the will be silent in respect to interest, it is a general rule, that the interest shall commence only from that time: for it is given for delay of payment, and, consequently, till the day of payment arrives, no interest can accrue to the legatee^(t). Hence, as we have seen^(u), if a legacy be left to

^(o) *Maxwell v. Wettenhall*, 2 P. Wms. 26.

^(p) *Gibson v. Bott*, 7 Ves. jun. 96, 97. *Swearingham v. Stull*, 4 Har. & M'Hen. 38.

^(q) *Shirt v. Westby*, 16 Ves. jun. 393.

^(r) *Gibson v. Bott*, 7 Ves. jun. 96, 97.

^(s) *Leake v. Robinson*, 2 Meriv. Rep. 384.

^(t) *Heath v. Perry*, 3 Atk. 102. *Hearle v. Greenbank*, 716. S. C. 1 Vez. 307.

^(u) *Smell v. Dee*, 2 Salk. 415. pl. 2. 2 P. Wms. 481. note 1. *Green v. Pigot*, 1 Bro. Ch. Rep. 105. *Ashburner v. M'Guire*, 2 Bro. Ch. Rep. 113. *Crickett v. Dolby*, 3 Ves. jun. 10. *Tyrrell v. Tyrrell*, 4 Ves. jun. 1.

^(v) *Supr.* 171. 313.

A, to be paid at twenty-one, and he die before, his representative shall wait till he would have attained that age, unless it were made payable with interest. Nor is it, in such cases, a question of construction, as whether the payment is suspended on account of the imbecility of the party, or with a view to the benefit of the estate. The rule I have just stated is technical, established in the ecclesiastical court, and adopted by the court of chancery in numerous adjudications^(v). If legacies are given to A and B, each to be paid to them at their respective ages of 23 years, and if they should die before that time, then their respective legacies to sink into the residue of the testator's personal estate, such legacies do not carry interest, and no maintenance can be allowed to the legatees^(w). But if a legacy be given to A, to be paid at twenty-one, and if he should die before attaining that age, then to B, and A die before twenty-one, several years after the testator, B is entitled to interest on the legacy from the death of A; for though in such case it were objected that this being as a new substantive legacy to B, the executor ought to have a year's time for the payment of it; yet the court held, that must be intended to be from the death of the testator, whereas in that case the testator had been dead much longer^(x).

But the principle does not extend to all cases: It does not apply where the legatee was the child of the testator: There the court will not postpone the payment of interest, even till a year after the death of the parent, but will order it immediately; since, by the law of nature, he was obliged to provide not only a future but a present maintenance for his child, and shall not be presumed to have meant to leave him destitute^(y). But if a father gives a legacy to a child payable at a future day, and makes an express provision for maintenance out of another fund, the legacy shall not carry interest until the time of payment^(z).

(v) *Tyrrell v. Tyrrell*, 4 Ves. jun. 3, 4, 5.

(w) *Descrambes v. Tomkins*, 1 Cox's Rep. 133.

(x) *Laundy v. Williams*, 2 P. Wms. 481.

(y) *Butler v. Butler*, 3 Atk. 60. *Heath v. Perry*, 102. *Crickett v. Dolby*, 3 Ves. jun. 13. See *Chambers v. Goldwin*, 11 Ves. jun. 1.

(z) *Wynch v. Wynch*, 1 Cox's Rep. 433.

And where the testator devised estates in Jamaica to trustees and their heirs, in trust to maintain and educate his sons during their minority, and his daughter until the age of twenty-one years, or day of marriage, which should first happen, and subject thereto, devised the estates to his sons, charged with the payment of 10,000*l.* to his daughter, in case she should live to attain her age of twenty-one years, the same to carry interest from the time of her attaining such age of twenty-one, at the rate of 6*l.* per cent. and to be paid by instalments, the first payment to be made when and if she should attain twenty-one; and the daughter married at the age of eighteen years. Lord Eldon held, that the testator having expressly given interest from the period of the daughter's majority to the time when the legacy was to be paid, could not mean that the child should have nothing during the interval between her marriage and her attaining the age of twenty-one years, and therefore decreed her a reasonable maintenance out of the assets for that period (^a).

And where a testator gave a legacy to his daughter, to be paid to her at twenty-one or marriage, without interest for the same in the meantime, but if she died before twenty-one or marriage, then the legacy was not to be raised, but was to sink into the residue of his personal estate, and he directed that out of the interest of the legacy certain sums of money should be applied for the maintenance of his daughter: it was held that the interest of the legacy beyond the maintenance was vested in the daughter, and must accumulate for her benefit (^b).

[326] Whether a legatee, if a natural child, be also comprised within the exception, is not so clear. Lord Hardwicke, C. expressed an opinion in the negative, as well on the principle of law, which recognizes no relationship in such child, as also on the general policy of encouraging marriage, and discontenancing immorality (^c). In a recent case, the Master of the Rolls intimated, that illegitimate children were to be admitted to the same benefit (^d). But in a subsequent case, the Court of Ex-

(^a) *Chambers v. Goldwin*, 11 Ves. jun. 1.

(^b) *Carey v. Askew*, 1 Cox's Rep. 243.

(^c) *Hearle v. Greenbank*, 1 Vez. 310.

(^d) *Crickett v. Dolby*, 3 Ves. jun. 12.

chequer held that they are not^(e)). If, however, it can be applied from the wording of the will that the testator intended it, interest will be allowed from the testator's death^(f).

Whether a grandchild shall be thus favoured, is a point likewise on which there has been a difference of opinion: such advantage has been, in several instances, denied to him^(g). But his honour, in the case just alluded to, appears to have considered him as on the same footing with a child: And that opinion has been confirmed by subsequent adjudications^(h). The widow of the testator will not be entitled to interest from the time of his death⁽ⁱ⁾. A legacy to a nephew, payable at twenty-one, is clearly comprehended under the general rule, and shall carry interest only from the time of payment^(k). And a legacy to the wife of a nephew, expressly given for the maintenance of herself and children, she being separated from her husband, shall only carry interest from the end of the year after the testator's death; and the court considered it would be introducing a new rule, particularly as the legatee was adult, if it were held otherwise^(l). But the rule is not applicable to a bequest of a residue, subject to be divested on a contingency; for it would be absurd to say the testator meant to die intestate as to the produce, when he has given a vested interest in the capital^(m). If a legacy be left to an infant payable at twenty-one, and devised over on his dying before he attains that age, and such event happens, the interest accumulated from the death of the [327] testator to that of the infant shall go to his representative, and not to the remainder-man⁽ⁿ⁾. And where legacies

^(e) Lowndes v. Lowndes, 15 Ves. jun. 301.

^(f) Hill v. Hill, 3 Ves. & Bea. 183.

^(g) Haughton v. Harrison, 2 Atk. 330. Butler v. Butler, 3 Atk. 59. 4 Bro. Ch. Rep. 149. in note, and Desrambes v. Tomkins, 1 Cox's Rep. 133.

^(h) Crickett v. Dolby, 3 Ves. jun. 12. 5 Ves. jun. 194, 195. in note. Collis v. Blackburn, 9 Ves. jun. 470. and see Hill v. Hill, 3 Ves. & Bea. 183.

⁽ⁱ⁾ Lowndes v. Lowndes, 15 Ves. jun.

301. Stent v. Robinson, 12 Ves. jun. 461.

^(k) Crickett v. Dolby, 3 Ves. jun. 12.

^(l) Raven v. White, 1 Swans. Rep. 553. S. C. 1 Wils. 204.

^(m) Nichols v. Osborn, 2 P. Wms. 420. Vid. Tyrrell v. Tyrrell, 4 Ves. jun. 4.

⁽ⁿ⁾ Tissen v. Tissen, 1 P. Wms. 500. 2 P. Wms. 421. note 1. ibid. 504. Green v. Ekins, 2 Atk. 473. Chaworth v. Hooper, 1 Bro. Ch. Rep. 82. ibid. 335. Shepherd v. Ingram, Ambl. 448. Vid. Butler v. Butler, 3 Atk. 59.

were given to infants, payable at twenty-one, with benefit of survivorship in the event of death under that age, and a power to the executors to apply any part of the legacies towards the maintenance of the legatees, the legacies were held to bear interest from the death of the testatrix; the infants being her cousins, and destitute of other provision (o).

If the father of an infant legatee be living, he is bound by the municipal law, as well as by the ties of nature, to maintain his child. Nor, as it has been frequently held, shall the interest of the legacy be applied to that purpose, unless in cases of great necessity, arising from the distressed and embarrassed circumstances of the parent (p). In cases so pressing, the infant shall be maintained out of the interest of the legacy, whether it be vested or contingent; and, although the legacy be devised over on the infant's dying before he attains twenty-one (q). Indeed, in some recent instances, where the will has contained an express direction for maintenance of the legatees out of the interest of the legacies, and there have been other children, not the objects of the testator's bounty, such maintenance has been ordered, on the ground of the father's not being of ability to educate the favoured children in a manner suitable to their fortunes (r). But the court will not make an allowance to a father for the maintenance of a child for the *time past*, although it should appear that he had not been of ability to maintain him, and the will has expressly given the produce to trustees for the child's maintenance (s). And the court has made a liberal allowance of maintenance for an infant, in regard to an illegitimate brother unprovided for (t).

On occasions extremely urgent, the court will even break in upon the principal; but this authority is exercised very spa-

(o) *Pott v. Fellows*, 1 Swans. 561.

(p) *Butler v. Butler*, 3 Atk. 60. *Darley v. Darley*, 399. *Vid. Andrews v. Partington*, 3 Bro. Ch. Rep. 60. *Walker v. Shore*, 15 Ves. jun. 122.

(q) *Butler v. Butler*, 3 Atk. 60. *Harvey v. Harvey*, 2 P. Wms. 21. But see *Buckworth v. Buckworth*, 1 Cox's Rep. 80.

(r) *Hoste v. Pratt*, 3 Ves. jun. 733.

Vid. also Mundy v. Earl Howe, 4 Bro. Ch. Rep. 223. *Heysham v. Heysham*, 1 Cox's Rep. 179.

(s) *Andrews v. Partington*, 2 Cox's Rep. 223.

(t) *Bradshaw v. Bradshaw*, 1 Jac. & Walk. 647.

ringly, and with great caution^(u). If the legacy be of small amount, and the interest altogether inadequate to the necessities of the infant, the court will order a part of the principal to be [328] immediately paid, and that as well for his education, as for his maintenance^(v). But if the legacy be devised over in case of the infant's dying before he comes of age, the principal, it seems, shall on no account be subject to such diminution^(w).

With respect to the *quantum* of the interest thus payable on a legacy, a distinction formerly prevailed between legacies charged on land, and such as were charged on the personal estate. It has been held, that as land never produces profit equal to the interest of money, the Court of Chancery will follow the course of things, and give interest, where it arises from land, one *per cent.* lower than where it arises from personal property^(x); but this distinction is now exploded: Whether legacies are charged on real or on personal estate, it is become the established practice to allow only four *per cent.* where no other rate of interest is specified by the will. And although pecuniary legacies not having the addition of the word "sterling," are to be paid, as I have already stated, according to the currency of the country where the will was made, yet the interest is to be computed, in conformity to the course of the court, at four *per cent.*, and not pursuant to the rate of interest in such country^(y). [2]

(u) *Harvey v. Harvey*, 2 P. Wms. 21.

Prec. Ch. 195.

Vid. supr. 318, 319.

(v) *Barlow v. Grant*, 1 Vern. 255.

(x) *Hearle v. Greenbank*, 1 Vez. 308, 309.

Harvey v. Harvey, 2 P. Wms. 21. Ex

(y) *Pierson v. Garnet*, 2 Bro. Ch. Rep.

parte Green, 1 Jac. & Walk. Rep. 253.

47. *Malcolm v. Martin*, 3 Bro. Ch.

(w) 4 Bac. Abr. 442. *Leech v. Leech*,

Rep. 53. 4 Bac. Abr. 440. in note.

1 Ch. Ca. 249. *Brewin v. Brewin*,

[2] The following decisions have been made relating to interest payable out of the estate of the decedent, and to interest payable by executors and administrators.

After an average is struck upon an insolvent estate, no interest can arise upon such average, chargeable against the estate. *Fitch v. Huntingdon*, Kirby, 38.

Where a father died possessed of a large real and personal estate, of which no distribution nor division was made during many years, the mother being appointed administratrix, it was held, that the mother was to be charged with interest on two-thirds of the money she had received in managing the estate,

[329] On the payment of a legacy an executor is bound to take a receipt for the same properly stamped according to the value of the legacy, and the relationship of the legatee.

and to be allowed interest on the sums expended by her for the education of the children. *Wilkes & ux. v. Rogers & al.* 6 Johns. Rep. 566.

In an action on an administration bond to recover the amount of a distributive share decreed by the judge of probate, the Court will allow interest from the time of passing the decree until the rendition of the judgment. *Paine v. M'Intire*, 1 Mass. T. R. 69.

A vested legacy does not carry interest but from the time when it is payable, except in the case of a legacy bequeathed to a minor, whom the testator was under a moral obligation to support, and for whom no support was provided until the legacy was payable. In this case, the legacy shall carry interest from the death of the testator, because it was presumed his intention was to fulfil a moral obligation. *Dawes, Judge, v. Swan et al.* 4 Mass. T. R. 208.

Where the failure to bring an executor to settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree: neither, in such case, ought interest to be allowed him on payment to the legatees before the decree, though made in bonds which carried interest. *Fitzgerald, Ex. of Jones v. Jones*, 1 Munf. Rep. 150.

An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due, (no proof appearing that it was then collected, or that interest from that day was received upon it,) but a reasonable time to collect and apply the money should be allowed before the commencement of interest. *Dalliard v. Tomlinson*, Ibid. 183. In such case, no interest ought to be charged where the right to the slaves was in dispute, and it was doubtful to whom the money when collected should be paid, no proof appearing that the executor or administrator received any interest or made any profit. *Ibid.*

Whether interest ought to be charged in an administration account, is a question which may depend upon extraneous testimony. *White's Ex'rs. v. Johnson & al.* 2 Munf Rep. 283.

Where a legatee is entitled to the profits of slaves, he is also entitled to interest thereon from the time of the receipt thereof by the executor, no good reason appearing for the failure to apply the principal to the use of the legatee. *Quarles' Ex'rs. v. Quarles & al.* 2 Munf. Rep. 321.

If a testator direct that no interest shall be demanded on a legacy, but that the executor will pay it off as soon as money can be raised by selling certain property, no interest is to be demanded until a reasonable time for raising the money shall have elapsed; after which, if the executor improperly withhold payment, he is chargeable with interest. *Putton, Adm. of Page, v. Williams & Wife*, 3 Munf. Rep. 59.

A testator directing legacies to be paid at the expiration of six months after his death, without deduction, the legatees are

An executor, except as to debts lost by his negligence or improper conduct, is chargeable with interest only on his actual receipts. And an executor is not chargeable with interest on a legacy payable to *an infant*, before a guardian has been appointed, and he has received notice of such appointment. *Cavendish v. Fleming*, 3 Munf. Rep. 198.

Moneys directed to be invested by executors in government securities should be accounted for as if invested, after a reasonable time, for that purpose: but the executors ought not to be charged with interest *during such reasonable time*; nor with interest on dividends of stock, if such dividends have not been *actually received*. *Carter's Ex. v. Cutting & Wife*, 5 Munf. Rep. 224.

Where a guardian or executor has been guilty of neglect in putting out money, or where he has made use of it himself, he shall be charged with interest. *Fox v. Wilcocks*, 1 Binn. 194. *Say's Ex. v. Barnes*, 4 Serg. & R. 116. And a reasonable rule is to strike a balance of the money in the hands of the guardian at the end of every six months, and to charge him with simple interest on that, allowing a reasonable sum for contingent expenses. *Ibid.*

The executor will be allowed interest on his balance. *Jones v. Williams*, 2 Call's Rep. 102.

When interest is charged against an executor or administrator, (in settling his administration account,) on balances due at the end of each year, it ought not to be carried to the account of the succeeding years, so as to convert it into principal, and make it bear interest; nor to be deducted from the payments made in such succeeding years. *Sheppard's Ex. v. Starke & Wife*, 3 Munf. Rep. 29.

Where a former administrator settles and signs an account, the present administrator shall be bound and pay interest. *Haywood's Rep.* 104.

Where slaves are specifically bequeathed to a child, when he or she shall attain the age of twenty-one years, or shall marry, and no provision is made expressly for maintenance in the meantime, their intermediate profits (if not otherwise disposed of) do not pass by a general residuary clause, but go to the legatee. In such case, the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor; no good reason appearing for his failure to apply the principal to the use of the legatee. *Quarles' Ex'rs. v. Quarles & al.* 2 Munf. Rep. 321.

In general, where a legacy is given, and no time of payment is mentioned, it is not payable till the end of the year from the death of the testator; nor does it carry interest, except in the case of a legacy to a child not otherwise provided for, when interest is allowed from the testator's death. *Eyre v. Golding*, 5 Binn. 475.

There is a difference between the legacy of a sum of money to one for term of life, and a bequest of a sum to be paid annually for life. In the first case, the legacy, not being payable till the end of a year from the testator's death,

entitled to the full amount, and the legacy duty must be paid by the executors (^a).

An executor paid to a legatee for four years an annuity charged on a real estate, without deducting the legacy duty, which was not in fact paid by him according to the provisions of 45 Geo. 3. c. 28, until after the legatee had assigned all his interest in such annuity; it was held, that the legatee was liable to repay him the duty, it not being a voluntary payment; and the executor was only made liable by the act for the benefit of government, and not on his own account; he was therefore no more than surety for the legatee, and the case fell within the principles applicable to sureties (^b).

SECT. IV.

Of the ademption of a legacy.

I PROCEED now to inquire into the nature of an ademption of a legacy.

(^a) *Barksdale v. Gilliat*, 1 Swans. 562. (^b) *Hales v. Freeman*, 1 Bing. & Brod and see *Waring v. Ward*, 5 Vez. 670. Rep. 391.

carries no interest for that year: but in the latter case, the first payment of the annuity must be made at the end of the first year. *Ibid.*

One bequeathed to his daughter A "the interest of 400*l.* to be paid her annually during her life." Held, that the first payment was to be made to her at the end of a year from the testator's death. *Ibid.* 2 Browne's R. Append. 89.

Where a legacy is given to a child, payable at the age of twenty-one, without mention of interest, the general rule is, that interest shall be allowed from the death of the parent. *Miles v. Wistar*, 5 Binn. 479.

But where one bequeathed to the four children of his nephew the sum of 400*l.* each, which sums he directed to be placed out at interest at the expiration of two years after his decease, for the benefit of the said legatees respectively, and the principal and interest to be paid as they should respectively attain the age of twenty-one; but if any of them should die in his minority without issue, the share of such child so dying should be equally divided among his brothers; it was held, that the legatees were not entitled to interest during their minority, but that it must accumulate, and in case of the death of one of the legatees under age, would form part of the share to be divided among the survivors. *Ibid.*

An ademption of a legacy is the taking away, or revocation of it by the testator. It may be either express or implied. The testator may not only in terms revoke a legacy he had before given, but such intention may be also indicated by particular acts^(a): As where a father makes a provision for a child by his will, and afterwards gives to such child, if a daughter, a portion in marriage: or if a son, a sum of money to establish him in life, provided such portion, or sum of money be equal to or greater than the legacy, this is an implied ademption of it, for the law will not intend that the father designed two portions for the same child^(b). But this implication will not arise if the provision in the will is created by a bequest of the residue^(c); nor if the provision in the father's lifetime be subject to a contingency^(d); nor unless it be *ejusdem generis* with the legacy^(e); nor if it be expressly in satisfaction of a claim *aliundè*; nor if the portion be given absolutely, and the legacy under limitations^(f); nor if the testator were a stranger^(g); nor if the testator be the uncle of the legatee^(h); nor if the legatee be an illegitimate child, unless the testator placed himself clearly *in loco parentis*⁽ⁱ⁾; and the doctrine of ademption of legacies is fully considered as confined to the cases of parents, and persons placing themselves *in loco parentis*; and such implication is always liable to be repelled by evidence^(k). But if the testator, by a codicil subsequent to the portioning or advancement of the child, ratify and confirm his will, this, although a new publication, shall not avail to overturn the pre-

(a) 2 Fonbl. 353.

(b) 2 Fonbl. 354. note A. Hartop v. Whitmore, 1 P. Wms. 680. 2 Ch. Rep. 85. Jenkins v. Powell, 2 Vern. 115. Duffield v. Smith, 2 Vern. 257. Ward v. Lant, Prec. Ch. 183. Farnham v. Philips, 2 Atk. 216. Watson v. Earl Lincoln, Ambl. 325. Ellison v. Cookson, 2 Bro. Ch. Rep. 307. S. C. 3 Bro. Ch. Rep. 61. Cookson v. Ellison, 2 Cox's Rep. 220. Hartop v. Hartop, 17 Vez. 184.

(c) Farnham v. Philips, 2 Atk. 216.
(d) Spinks v. Robins, 2 Atk. 491.

(e) Grace v. Earl of Salisbury, 1 Bro. Ch. Rep. 425.

(f) Baugh v. Reed, 3 Bro. Ch. Rep. 192. Bell v. Coleman, 5 Madd. Rep. 22.

(g) Shudal v. Jekyll, 2 Atk. 516. Powell v. Cleaver, 2 Bro. Ch. Rep. 499.

(h) Brown v. Peck, 1 Eden's Rep. 140.

(i) Wetherby v. Dixon, Coop. Rep. 279. S. C. 19 Vez. 407. and see Ex parte Dubost, 18 Ves. 140.

(k) Shudal v. Jekyll, 2 Atk. 516. Debeze v. Mann, 2 Bro. Ch. Rep. 165. 519. S. C. 1 Cox's Rep. 346.

sumption, that he meant to adeem the legacy; for such words are merely formal⁽¹⁾. A gift by a parent in his lifetime to legatees, after a will giving them legacies, has been held to be part satisfaction of the legacies, upon evidence of the intention of the testator to that effect.

In respect to the ademption of a legacy, all the cases on the subject concur in the principle, that the intention of the testator must govern; but, in the application of that principle, or what shall amount to evidence of such an intention, they are, in many instances, incapable of being reconciled.

Thus, in some cases it has been held, that where a sum of money is bequeathed out of a particular fund, such legacy is in [331] its nature general, a *legatum in numeratis*, and if the testator in his lifetime receive it, it must be made good to the legatee out of the general assets; for from that act of the testator no presumption can be raised of his intention to revoke his bounty⁽²⁾. In other cases it has been decided, that such a legacy under the same circumstances is adeemed⁽³⁾. Some authorities distinguish between the bequest of a sum of money to be satisfied out of a particular fund, and, consequently, a general legacy, and a bequest of a specific debt; that the former is not adeemed, while the latter is adeemed by payment to the testator⁽⁴⁾. But these last-mentioned cases differ in their construction of what shall be the bequest of a general legacy, as opposed to that of a specific debt. Some, as we have already seen⁽⁵⁾, adopt a distinction between the bequest of a certain sum of money due from a particular person, as "five hundred pounds due on a bond from A;" and a bequest of such debt generally, as, "of the bond from A;" that, in the former instance, the legacy is pecuniary, in the latter specific⁽⁶⁾. But,

⁽¹⁾ Irod *v.* Hurst, 2 Freem. 224. Thelinson *v.* Woodford, 4 Madd. Rep. 421.

⁽²⁾ 4 Bac. Abr. 355. Ashburner *v.* M'Guire, 2 Bro. Ch. Rep. 108. Finch, 152. Pawlet's Case, Raym. 335. Savile *v.* Blacket, 1 P. Wms. 777.

⁽³⁾ Badrick *v.* Stephens, 3 Bro. Ch. Rep. 431. See also 2 Fonbl. 367. note ^(f).

⁽⁴⁾ Hambling *v.* Lister, Ambl. 401.

⁽⁵⁾ Vid. supr. 303.

⁽⁶⁾ Rider *v.* Wager, 2 P. Wms. 330. and note 1. ibid. Attorney-General *v.* Parkin, Ambl. 566. Carteret *v.* Lord Carteret, cited 2 Bro. Ch. Rep. 114. and see Le Grice *v.* Finch, 3 Merl. Rep. 50.

according to other cases, this distinction is too slender to be relied on^(r). A difference has also, in some instances, been taken between a compulsory, and a voluntary payment to the testator of such debt; in other words, where the testator himself [332] calls in a debt which he has bequeathed, and where the debtor unprovoked, and without application, thinks fit to pay it; that, in the former instance, it is the act of the testator, and, consequently, an ademption; in the latter he is merely passive, and, therefore, cannot be presumed to have changed his mind^(s). But the doctrine of some cases is, that this distinction has no weight^(t); and of others, that it has no existence^(u), and that the case is not varied by the mode of payment. In another class of cases this distinction between a compulsory and a voluntary payment has been recognized as very important, but not as an absolute rule of decision; on the principle, that the testator's calling for payment is not of itself sufficient evidence of an intention to adeem, but an equivocal act requiring explanation^(v).

It is, however, clear, that if the legacy be of a specific chattel, and the testator alter the form, so as to alter the specification of the subject; as if, after having given a gold chain by his will, he convert it into a cup; or, after he has bequeathed wool, he make it into cloth, or a piece of cloth into a garment; the most obvious conclusion that can be formed from such an act is, that he has changed the intention he had expressed in his will; therefore, in such instances, the legacy shall be adeemed^(w). So, if he bequeath his stock in a particular fund, and sell it out subsequently to the making of the will, this, on the same principle, amounts to an ademption^(x). And where a testator bequeathed two policies on a life upon certain trusts,

(r) *Ashburner v. M'Guire*, 2 Bro. Ch. Rep. 111. 1 Eq. Ca. Abr. 302.

(s) *Crockat v. Crockat*, 2 P. Wms. 165. 330. note 1. *ibid.* *Bronsdon v. Winter*, Ambl. 57.

(t) *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 461. *Ashton v. Ashton*, 3 P. Wms. 386. S.C. 2 P. Wms. 469. *Ford v. Fluming*, 2 Str. 823.

(u) *Attorney-General v. Parkin*, Ambl.

566. *Ashburner v. M'Guire*, 2 Bro. Ch. Rep. 109. 4 Bac. Abr. 355. note (B). *Stanley v. Potter*, 2 Cox's Rep. 180.

(v) *Drinkwater v. Falconer*, 2 Ves. 623. *Hambling v. Lister*, Ambl. 401. *Coleman v. Coleman*, 2 Ves. jun. 629.

(w) 3 Bro. Ch. Rep. 110. (x) *Ibid.* 108. *Barker v. Rayner*, 5 Madd. Rep. 208.

and received the amount of the policies in his lifetime, it was held, that the legacies were adeemed.—But if A bequeath so much stock to B, and, after making his will, sell it out and then buy in again the same quantity of stock, this is no ademption: for if the selling of the stock is evidence of his having altered his intention, his buying it in again is evidence, equally strong, that he meant the legatee should have it^(y). If the testator, after such bequest of stock, sell out part and die, such sale shall be an ademption *pro tanto*^(z). Thus, where A bequeathed a moiety of two-thirds of the residue of the South Sea Stock, India, Bank, and Orphan Stock, Leases, East India and South Sea Bonds, and other his personal estate to B; B before he received this legacy made his will, and devised this moiety to trustees to sell and pay out of the same the sum of two hundred pounds to C and the residue of the money to D: Afterwards B and the legatee of the other moiety coming to an account with the executor of A, their respective shares were set out and received, and the stock and bonds were allotted to B, who sold part of them in his lifetime, but kept no account of the produce: This was decreed to be an ademption of the legacy to D *pro tanto*: But it was held that B's receipt of his share was clearly no ademption; inasmuch as the object both of B and the [334] other was merely to ascertain their moieties, and to prevent survivorship^(a).

So it has been decided, that a bequest of a debt shall not be adeemed by the testator's having received dividends upon it under the bankruptcy of the debtor^(b). But that such legatee is entitled to the dividends not received by the testator, and whatsoever may in future be payable out of the bankrupt's estate, in respect of that debt.[1]

(y) *Partridge v. Partridge*, Ca. Temp. Talb. 226.

(z) Ca. Temp. Talb. 226. *Nash v. Nash*, 1 *Hayw. Rep.* 229.

(a) *Birch v. Baker*, Mos. 373.

(b) *Ashburner v. M'Guire*, 2 Bro. Ch. Rep. 108.

[1] The owner of a slave, by his will, declared as follows: “*I manumit and give freedom to my negro woman Mott, and her daughter Nan, immediately after my decease.*” The testator afterwards sold Nan as a slave to C, and died. Held, that the sale of the slave by the testator was *pro tanto* a revocation of the will, and that she was not entitled to her freedom after his decease. *Matter of Nan Miekel*, 14 Johns. Rep. 324.

SECT. V.

Of cumulative legacies.

LEGACIES may be also cumulative: They are contradistinguished from such as are merely repeated. As where a testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both, or to one only. And on this point likewise the intention of the testator is the rule of construction (^a).

On this head there are three classes of cases; first, those cases in which there is no evidence of such intention, either internal or extrinsic, one way or the other; those cases where there is internal evidence; and also those in which there is extrinsic evidence.

[335] In regard to the first, where there is neither internal nor extrinsic evidence, it is necessary to recur to the rule of law (^b). There are four instances of this class:

Where the same specific thing is bequeathed to A twice in the same will, or in the will and again in a codicil: in that case he can claim the benefit only of one legacy, because it could be given no more than once (^c).

Where the like quantity is bequeathed to him twice by one and the same instrument: there also he shall be entitled to one legacy only (^d). So where an unconditional legacy was given by a third testamentary paper, it was held to be a substitution for a conditional legacy to the same amount, given by the first testamentary paper (^e).

Where the bequest to him is of unequal quantities in the same instrument; the one is not merged in the other, but he has a right to them both (^f).

(^a) 4 Bac. Abr. 361. Ridges *v.* Morrison, 1 Bro. Ch. Rep. 389. Coote *v.* Boyd, 2 Bro. Ch. Rep. 527.

(^b) Hooley *v.* Hatton, 1 Bro. Ch. Rep. 391, in note.

(^c) 1 Bro. Ch. Rep. 392, in note. and ibid. 393.

(^d) 1 Bro. Ch. Rep. 392, in note.

Swinb. p. 7. s. 21. 1 Bro. Ch. Rep. 30, in note. 4 Bac. Abr. 361. Masters *v.* Masters, 1 P. Wms. 424. Dewit *v.* Yates, 10 Johns. Rep. 156.

(^e) Attorney-General *v.* Harley, 4 Madd. Rep. 263.

(^f) 1 Bro. Ch. Rep. 392, in note. Vid. Coote *v.* Boyd, 2 Bro. Ch. Rep. 521.

And, lastly, where the bequest to him is of equal, or unequal, quantities by different instruments : in that case also there shall be an accumulation (g).

There are likewise cases in which there is internal evidence of the testator's intention ; as where a latter codicil appears to be merely a copy of the former with the addition of a single legacy ; or where both legacies are given for the same cause ; they shall not be cumulative, whether given by the same or different instruments, as they shall be where one is given generally, and the other for an express purpose ; or where one reason is assigned for the former, and another for the latter ; or where the legacies are not *ejusdem generis*, as where an annuity and a sum of money is given (h), or two annuities of the same amount, by different instruments, the one payable quarterly, the other half-yearly (i) : or two annuities of different amounts, the one given by the will, payable out of real estate, the other by the codicil, payable out of personal estate (k). In like manner it may be collected from the context, whether the testator meant a duplication, or a mere repetition of the first bequest. And his intention has been inferred from very slight circumstances (l).

Extrinsic evidence is also admissible on this subject. Whether the testator by giving two legacies did, or did not, intend the legatee to take both, is a question of presumption, which will let in every species of proof (m). Hence, if the testator, after the making of the will, and before the date of the codicil, had an increase of fortune, that circumstance has been held to prove that he intended an additional bounty (n). [1]

(g) 1 Bro. Ch. Rep. 391. and 392, in note. Masters *v.* Masters, 1 P. Wms. 423. 1 Ch. Ca. 361. Foy *v.* Foy, 1 Cox's Rep. 163. Baillie *v.* Butterfield, ibid. 392. Benyon *v.* Benyon, 17 Ves. 34.

(h) Masters *v.* Masters, 1 P. Wms. 423.

(i) Currie *v.* Pye, 17 Ves. jun. 462.

(k) Wright *v.* Lord Cadogan, 2 Eden's Rep. 239.

(l) 4 Bac. Abr. 361. Duke of St. Alban's *v.* Beauclerk, 2 Atk. 640. Ridges *v.* Morrison, 1 Bro. Ch. Rep. 389. Coote *v.* Boyd, 2 Bro. Ch. Rep. 521. 1 P. Wms. 424, in note 2. Benyon *v.* Benyon, 17 Ves. jun. 34.

(m) Coote *v.* Boyd, 2 Bro. Ch. Rep. 527, 528. 4 Bac. Abr. 361, in note.

(n) Masters *v.* Masters, 1 P. Wms. 424.

[1] Under the head of cumulative legacies, may be considered the increase of slaves bequeathed for the life of the legatee. This increase belongs to such legatee, according to the decisions in *Scott v. Dobson*, 1 Har. & M'Hen. 160. and *Johnson v. Somerville*, Ibid. 352.

SECT. VI.

Of a legacy being in satisfaction of a debt.

UNDER certain circumstances, a legacy is regarded in the [337] light of a satisfaction of a debt. On this point also, the intention of the testator is the criterion (^a).

It is a general rule, that a legacy given by a debtor to his creditor, which is equal to, or greater than the debt, shall be considered as a satisfaction of it (^b).

But this is merely a rule of construction, and the courts in a variety of instances have denied the application of it, where they have been able to collect from the will circumstances to repel the presumption (^c): As where it contains an express direction for the payment of debts (^d), or if the legacy be less than the debt, it has been held not to go in discharge, nor even in diminution of it (^e).

Nor shall the legacy be a satisfaction if it be conditional, or given on a contingency, for it shall not be supposed, that the testator intended an uncertain recompense in satisfaction of a certain demand (^f). Nor is a legacy considered as a satisfaction, where it is not equally beneficial with the debt in one respect, though it may be more so in another; as, where the legacy is to a greater amount, but the payment of it is postponed

(^a) 4 Bac. Abr. 362. *Cuthbert v. Peacock*, 1 Salk. 155. pl. 5. *Cranmer's Case*, 2 Salk. 508. 2 Fonbl. 332.

(^b) 1 P. Wms. 409, note 1. *Talbot v. Duke of Shrewsbury*, Prec. Ch. 394. *Jeffe v. Wood*, 2 P. Wms. 132. *Fowler v. Fowler*, 3 P. Wms. 353. *Reech v. Kennegal*, 1 Ves. 126. *Vid. Crompton v. Sale*, 2 P. Wms. 555.

(^c) 1 P. Wms. 409, note 1.

(^d) *Chancey's Case*, 1 P. Wms. 410. *Richardson v. Greese*, 3 Atk. 66. 68. sed vid. *Gaynor v. Wood*, at the Rolls.

cited 1 P. Wms. 409, note 1. and 4 Bac. Abr. 428.

(^e) *Cranmer's Case*, 2 Salk. 508. *Hawes v. Warner*, 2 Vern. 478. *Eastwood v. Vinke*, 2 P. Wms. 616. *Minuel v. Sarazine*, Mos. 295.

(^f) 2 Fonbl. 331. *Talbot v. Duke of Shrewsbury*, Prec. Ch. 394. *Cranmer's Case*, 2 Salk. 508. *Nicholls v. Judson*, 2 Atk. 300. *Spinks v. Robins*, ib. 491. *Crompton v. Sale*, 2 P. Wms. 555. *Barret v. Beckford*, 1 Ves. 519.

[338] for however short a period (^g) : nor shall a legacy be held to be in satisfaction of a covenant, unless it be equally beneficial in amount, certainty, and time of enjoyment, with the thing contracted for (^h).

Nor if the debt were on an open or running account, so that the testator could not tell whether the balance was in favour of the legatee or not (ⁱ). Nor if the debt were contracted after the making of the will in which the legacy is given, shall he be supposed to have had it in contemplation to satisfy a debt that was not then in existence (^k).

Parol declarations by the testator are admissible in evidence, to repel the presumption of the satisfaction of a debt, by the bequest of a legacy of greater amount, even where such declarations were not contemporaneous with, but subsequent to the making of the will ; and although the expressions in the will may afford an inference in favour of the presumption (^l).

But in all cases the legacy shall be construed as a satisfaction, in case there be a deficiency of assets.

Where a legacy is decreed to be in satisfaction of a debt, the court always gives interest from the testator's death (^m).

On the other hand, if a legacy be left to the testator's debtor, the debt shall be deducted from the legacy, for the legatee's demand is in respect of the testator's assets, without which the executor is not liable, and therefore the legatee in such case is considered by a court of equity to have so much of the assets already in his hands as the debt amounts to, and consequently to be satisfied *pro tanto* ; for there can be no pretence to say, that because the testator gives a legacy to his debtor, that this is an argument to evidence that the testator meant to remit the

(^g) Atkinson *v.* Webb, Prec. Ch. 236. Hawes *v.* Warner, 2 Vern. 478. Nicholls *v.* Judson, 2 Atk. 300. Clark *v.* Sewell, 3 Atk. 96. Hayes *v.* Mico, 1 Bro. Ch. Rep. 129. Jeacock *v.* Falkeiner, ib. 295. 2 Fonbl. 331, note M. Mathews *v.* Mathews, 2 Ves. 635. 1 P. Wms. 409, note 1.

(^h) Blandy *v.* Wedmore, 1 P. Wms. 524. 409. note 1. Eastward *v.* Vinke,

2 P. Wms. 614. 2 Fonbl. 332. note O.

(ⁱ) Rawlins *v.* Powel, 1 P. Wms. 299.

(^k) 2 Fonbl. 331, 332. 2 Salk. 598. Chancey's Case, 1 P. Wms. 409. Thomas *v.* Bennet, 2 P. Wms. 343. Fowler *v.* Fowler, 3 P. Wms. 353.

(^l) Wallace *v.* Pomfret, 11 Ves. jun. 542. Sed vid. 3 P. Wms. 354.

(^m) Clark *v.* Sewell, 3 Atk. 99.

debt. So under certain circumstances, money or goods lent or delivered by the executor to such legatee, was held by the court to be in part payment of the legacy (ⁿ).

If the testator bequeath to his debtor the debt, this being no more than a release by will, operates, as we have seen (^o), only as a legacy; and is assets, subject to the payment of the testator's debts (^p).

Where a legacy was left to the wife of A, who was largely indebted to the testatrix, and A became a bankrupt, and his wife afterwards died without having asserted any claim in respect of the legacy and the assignees claimed it, it was held, that the executors of the testatrix were entitled to retain the legacy in part discharge of the debt due to the testatrix (^q). [1]

(ⁿ) *Jeffe v. Wood*, 2 P. Wms. 128.

(^o) *Ranking v. Barnard*, 5 Madd.

(^o) Supr. 308.

Rep. 32.

(^p) *Rider v. Wager*, 2 P. Wms. 332.

[1] In an action brought by A against an executor for a legacy, the defendant offered in evidence an account, and certain bonds, which had been paid and cancelled by the testator, on which there was an endorsement by the testator, that by agreement between A and B, they were to be charged to the account of A, and the bonds were for that reason cancelled, which endorsement was prior to the date of the will. It was held, that the account and endorsement on this bond were not sufficient to support a debt set up by the executor against the plaintiff; and that if the debt had been proved, it would not have been released or extinguished by the legacy. *Rickets v. Livingston*, Ex. 2 John. Cas. 97.

Although, generally, a devise of *land* is not a satisfaction, or part performance of a debt or agreement to settle *money*, yet, if the contract authorizes such a mode of making satisfaction, it will be so decreed, though it is not stated in the will to be in satisfaction. *Bryant v. Hunter & al.* C. C. April, 1811. Pennsylvania District. Wharton's Digest, 611. If the devisee in such case dispose of the land devised, though by a will which cannot pass real estate, yet it is evidence of the acceptance of the land in satisfaction or part performance. *Ibid.*

A testator, who was indebted to his sons, A and B, in a sum equal to about \$1400, bequeathed to A some small specific legacies. The will further declared, that "whereas my son B is indebted to me in sundry sums advanced for his benefit, my will is, that all his debts to me be cancelled, and I bequeath to him the sum of five hundred dollars, *and no more*." At the time of the testator's death, B was separately indebted to him in the sum of \$10000 and upwards, and he had previously received from the testator a gift of stock to

[339] SECT. VII.

Of the abatement of legacies,—of the refunding of legacies,—of the residuum.

In case the estate be sufficient to answer the debts and specific legacies, but not the general legacies, they are subject to abatement, and that in equal proportions; but in such case nothing shall be abated from specific legacies^(a).

Nor shall a sum of money bequeathed by the testator, in satisfaction or recompense of an injury done by him, abate any more than a specific legacy^(b). But a legacy, although devised to be paid in the first place, shall abate, if the fund be insufficient for the legacies^(c), unless, perhaps, it be a provision for a wife^(d). So a devise of a personal annuity is not, as we have seen^(e), a specific legacy, but a legacy of quantity, and liable to abate accordingly^(f).

If A devise specific and pecuniary legacies, and direct by the will that such pecuniary legacies shall come out of all his personal estate, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which [340] are pecuniary, otherwise the bequest to the pecuniary legatees would be altogether nugatory^(g). So a legacy in favour of a charity, although preferred by the civil law, shall by our

(^a) 2 Fonbl. 374. 2 Bl. Com. 513. Clifton v. Burt, 1 P. Wms. 679.

(^b) 2 Fonbl. 377.

(^c) 2 Fonbl. 378. Brown v. Allen, 1 Vern. 31. Beeston v. Booth, 4 Madd. Rep. 161.

(^d) Lewin v. Lewin, 2 Vez. 417.

(^e) Vid. supr. 303.

(^f) Hume v. Edwards, 3 Atk. 693. Lewin v. Lewin, 2 Vez. 417. Sed vid. Peacock v. Monk, 1 Vez. 133.

(^g) Sayer v. Sayer, Prec. Ch. 393. 2 Fonbl. 377, 378.

the value of \$6000. The testator left real and personal property to the amount of \$255,000. Held, that the bequest did not amount to a satisfaction of the debt due by the testator to his sons. *Byrne & al. v. Byrne & al.* 3 Serg. & R. 54.

law abate equally with other general legacies^(h). So a legacy to servants shall abate in the same manner⁽ⁱ⁾.

But where a legacy of 200*l.* was bequeathed for building a monument for the testatrix's mother, from whom the testatrix derived the greatest part of her estate, it was decreed, that being a debt of piety, it should not abate with the other legacies^(k). So where 3*l.* were given to the poor of three several parishes, it was considered by the Court as part of the funeral and as doles of the funeral, and therefore held that no abatement ought to be made out of them^(l). And where the testator, after giving various legacies, expressed at the end of his will his apprehension that there would be a considerable surplus of his personal estate beyond what he had before given away in legacies, for which reason he gave several further legacies; and afterwards, by a codicil, he gave several other legacies. It was decreed, that the subsequent legacies given by the will having been given in a presumption that there would be a surplus, and there happening to be no surplus, the former legacies should have a preference, and the legacies given at the end of the will should be lost. That the same apprehension of a surplus must be intended to have continued in the testator at the time of making his codicil, and, therefore, unless the inference can be repelled, the legacies by the codicil must be lost also^(m).

In case of a deficiency of general assets, that is to say, of assets to pay debts, specific legacies, although not liable to abate with the general legacies, must abate in proportion among themselves⁽ⁿ⁾.

Where the vendor of an estate would have absorbed the personal assets in payment of his purchase money, which was directed by the will to be paid by the executor, a rateable contri-

^(h) *Jennor v. Harper*, Prec. Ch. 360. *Tate v. Austen*, 1 P. Wms. 265. *Masters v. Masters*, 422. *Earl of Thomond v. Earl of Suffolk*, 462. *Attorney-General v. Hudson*, 675. *Attorney-General v. Robins*, 2 P. Wms. 25. 296.

⁽ⁱ⁾ *Attorney-General v. Robins*, 2 P. Wms. 25.

^(k) *Masters v. Masters*, 1 P. Wms. 423.

^(l) *Attorney-General v. Robins*, 2 P. Wms. 25.

^(m) *Ibid.* 23.

⁽ⁿ⁾ 2 Fonbl. 377. note (q). *Duke of Devon v. Atkyns*, 2 P. Wms. 382. *Long v. Short*, 1 P. Wms. 403. *Webb v. Webb*, 2 Vern. 111.

bution was decreed, as between the devisee of the estate and the legatees and annuitants under the will (^o).

We have before seen (^p) that a testator may carve specific legacies out of a specific chattel; now, in such case, if the chattel so parcelled out prove deficient, such specific legacies must abate proportionally among themselves (^q).

And in a devise in trust to sell, but not for less than 10,000*l.*, and to pay several sums amounting to 7,800*l.*, and the overplus moneys arising from the sale to A, it was held a specific legacy of 10,000*l.*, and the sale producing less, that A and the others should abate (^r).

Such is the advantage to which a specific legatee is entitled, that he should not contribute with the other legatees in case of a deficiency. But, on the other hand, he is subject to a risk; as, for example, if such specific legacy be a lease, and there be an eviction; or if goods, they be mislaid or burnt; or if a debt, it be lost by the insolvency of the debtor: in all these instances, such specific legatees shall receive no contribution (^s). [1]

(^o) Headley *v.* Redhead, Coop. Rep. 50.

(^q) Sleech *v.* Thorington, 2 Vez. 563.

(^r) Vid. supr. 302.

(^r) Page *v.* Leapingwell, 18 Vez. 463.

(^s) Hinton *v.* Pinke, 1 P. Wms. 540.

[1] Even a specific legacy will under certain circumstances be subjected to abatement, as, where a *pro rata* distribution of the estate of a testator was made to the legatees by order of the Supreme Court of Probate, and A, a legatee, accepted the average, it was held, that he could support no claim against the executor, on the ground that the legacy bequeathed to him was specific for the part of the legacy remaining unpaid, until further estate should be discovered. By accepting an average, with knowledge of all the circumstances, he acquiesced in it, and was concluded by the adjustment. *Sheple v. Farnsworth*, 4 Mass. T. R. 632.

Where a legacy is bequeathed under a restriction, in the following words, "It is my will and desire, that if the personal estate, and the produce arising from the real estate, of which I shall die seised and possessed, shall not be sufficient to answer the several annuities and legacies, they shall not abate in proportion, but that the whole of such deficiency, if any there be, shall be deducted out of the said sum of 1500*l.* by me hereinbefore bequeathed," &c. if the estate of the testator is sufficient at his death, but becomes insufficient afterwards on account of the insolvency of an executor, the legacy restrictively bequeathed must be applied to make up the deficiency; the words "the personal and real estate of which I shall die possessed" being equipollent to the

[341] On the same principle, legatees in certain circumstances are bound to refund their legacies, or a rateable part of them, as in all cases of a deficiency of assets for the payment of debts^(t). If the fund be merely insufficient to pay the legacies, and the executor pay one of the legatees, a distinction is to be remarked between cases, where such payment was voluntary, and where it was compulsory; and also between cases in which the assets were originally deficient, and where they became so by his subsequent misapplication of them. If the executor paid the legacy voluntarily, the law presumes that he has sufficient to pay all the legacies, and the other legatees can resort only against him. The legatee, who has been paid, is subject to no claim on the part of the other legatees^(u); provided, according to some authorities^(v), the executor be solvent; but if the executor prove insolvent, so that there are no other means of redress, a court of equity will entertain a bill to compel such legatee to refund.

In case the assets appear to have been originally deficient, if the executor, either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. And, even if such legatee obtain a decree for his legacy, and be paid, the other legatees may oblige him to refund in the

(t) 2 Bl. Com. 513. Noel *v.* Robinson,
1 Vern. 94. Hodges *v.* Waddington,
2 Ventr. 360.

(u) Orr *v.* Kaines, 2 Vez. 194. New-
man *v.* Barton, 2 Vern. 205.
(v) Orr *v.* Kaines, 2 Vez. 194.

words "all my real and personal estate," and therefore fixing no time when the insufficiency is to be tested, that time is when the will is to be carried into execution by an application of the funds to their object. *Silsby & al. v. Young & Silsby*, 3 Cranch, 264.

And where a specific pecuniary legacy is given to the same person to whom the *residuum* is given, and on the same terms, it assumes the character of a residuary bequest, and the testator cannot be understood as having intended to give it any preference over the *residuum*. *Ibid.*

It is provided by Act of Assembly in Pennsylvania, and also in New York. "That, where it shall so happen that there are assets in the hands of the executor to discharge all the debts of the testator, with an overplus not sufficient to discharge all the legacies that may be given, then an abatement shall be made in proportion to the legacies so given, unless it shall be otherwise provided by the will."

same manner. But if the executor had at first enough to pay all the legacies, and, by his subsequent wasting of the assets, [342] they become deficient, in that case such legatee shall not be compelled to refund, but shall retain the benefit of his legal diligence in preference to the other legatees, who neglected to institute their suit in time; by which they might have secured to themselves the same advantage (w).

Nor is a legatee bound to refund at the suit of the executor, unless the payment by him were compulsory (x); or unless the deficiency were created by debts which did not appear till after the payment of the legacy (y): in either of which cases, the executor, as well as a creditor, may compel the legatee to refund the legacy; for an executor who pays a debt out of his own purse stands in the place of a creditor, and has the same equity as against such legatee (z). [2]

When the executor has paid all the debts, and all the legacies above-mentioned, pecuniary and specific, he must in the last place pay over the surplus or residuum to the residuary legatee (a). And although the residuary legatee die before payment of the debts, and before the amount of the surplus is ascertained, yet it shall devolve on his representative (b).

The residue, generally speaking, comprehends such legacies as have lapsed (c); but the testator may by the terms of the

(w) 1 P. Wms. 495. note 1. Edwards v. Freeman, 2 P. Wms. 446.

(z) 4 Bac. Abr. 428. Vin. Abr. tit. Devise, (Q. d.)

(x) Newman v. Barton, 2 Vern. 205.

(a) 2 Bl. Com. 514. 4 Bac. Abr. 428.

(y) Nelthrop v. Hill, 1 Ch. Ca. 136.

(b) Brown v. Farndell, Carth. 52.

(c) Jackson v. Kelly, 2 Vez. 285.

[2] In New York and Pennsylvania, the legatee is required by statute to give bonds in double the amount nominated in the will, or supposed to be demandable under it, with two sureties, to be approved by the executor, conditioned, that if any part or the whole of such legacy shall at any time after be required to pay the debts of the decedent, the legatee will refund the whole, or such part as shall be necessary.

In Virginia, a legatee is not entitled to a decree, but on the terms of giving bond and security (if demanded by the executor) to refund, in case it be needful for the payment of debts. *Clay v. Williams & al.* Munf. Rep. 129, and *Stoval's Ex. v. Woodson & Wife*, S. P. Ibid. 303. *Sheppard's Ex. v. Starke & Wife*, 3 Munf. Rep. 29.

[343] will so circumscribe and confine the residue, as that the residuary legatee, instead of being a general legatee, shall be a specific legatee and then he shall not be entitled to any benefit accruing from lapses, unless what shall have lapsed constitute a part of the particular residue: as where A on board a ship made his will, and gave to his mother, if alive, his gold rings, buttons, and chest of clothes, and to his executor, who was on board with him, his red box, arrack, and all things not before bequeathed; and at the time of making his will was entitled to a considerable leasehold estate by the death of his father, of his right to which he was ignorant: It was held that A's executor was legatee of a particular residue, namely, of what the testator had on board the ship, and such legacy excluded him from the general residue. But that as A's mother died in his lifetime, his rings, buttons, and chest of clothes lapsed into such particular residue, and devolved on his executor, not as executor, but as legatee of such particular residue^(d).

If the residuary estate be devised to A, B, and C, in joint tenancy, if A die in the lifetime of the testator, or if A die after the testator, but before severance of the joint tenancy in the residue, it shall survive to the two others^(e). But if it be given to A, B, and C, as tenants in common, on the death of one of them in the lifetime of the testator, his share shall not go to the survivors, but shall devolve on the testator's next of kin, according to the statute of distribution, as so much of the personal estate remaining undisposed of by the will^(f).

So if a third of the residuum be devised to each of three persons, and one of them die in the testator's lifetime^(g); or if the devise be revoked as to one of such residuary legatees, the consequence shall be the same^(h).

If A bequeath all the surplus of his personal estate after payment of the debts and legacies to J. S., and several creditors, although barred by the statute of limitations, commence actions

^(d) Cook v. Oakley, 1 P. Wms. 302.

Cray v. Willis, 2 P. Wms. 529.

^(e) Webster v. Webster, 2 P. Wms.

347. Bagwell v. Dry, 1 P. Wms. 700.

347.

Page v. Page, 2 P. Wms. 488.

^(f) Bagwell v. Dry, 1 P. Wms. 700.

^(h) 6 Bro. P. C. 1.

against the executor, on his refusal to plead the statute, equity will not, in favour of such residuary legatee, compel him to plead it⁽ⁱ⁾.

It is a general rule, that where a question arises between a legatee, or a party entitled to a portion, and the residuary legatee, the costs shall come out of the residue; yet if no question arise between such individual and the residuary legatee, but the question relate merely to the nature of the interest of the property severed from the general mass of the estate, the costs of originating that question are thrown on the specific property itself: as where the testator directed his executors to purchase 92*l.* per annum Bank Long Annuities, in trust for his sister for life, and after her decease the principal to be distributed among certain persons, and the executors purchased the Long Annuities accordingly, and invested the same in their names, and after a lapse of 17 years the tenant for life died, when a question arose in respect of the nature of the interest, which had been so long separated from the residuary estate. **Lord Eldon, C.** on appeal from the Rolls, held, that the costs of the suit relative to the trust fund, the right to which was in question in the cause, should be paid out of the same: and that his Honour's decree, directing that the costs should be paid out of the testator's general estate, should in that particular be varied. ^(k)

[344] If there be no residue, the residuary legatee has a claim to nothing. In no case shall he compel the other legatees to abate, for although this consideration might occasionally meet the testator's intention, yet it would, in most instances, lead to great confusion and embarrassment^(l). But it has been held, that if the executor be guilty of a *devastavit*, the residuary legatee shall not suffer exclusively; but on a deficiency of assets in consequence of such misconduct, shall come in *pari passu*

(i) 4 Bac. Abr. 429. 1 Eq. Ca. Abr. 305. 11 Vin. Abr. 269. **Lord Castleton v. Lord Fanshaw**, Prec. Chan. 100. **Ex parte Dewdney**, 15 Ves. jun. 498. *Sed contra, in favour of creditors, Person v. Mills*, 1 Mass. T. R. 431. 2

Mass. T. R. 86.

(k) **Jenour v. Jenour**, 10 Ves. jun. 562.

(l) **Fonnereau v. Poynz**, 1 Bro. Ch. Rep. 478. 1 P. Wms. 306, note 2. **Nash v. Nash**, 1 Hayw. Rep. 231.

with the other legatees. Yet according to that decision, the Court had it not in contemplation to afford the residuary legatee relief in case the testator had spent the residue in his lifetime; for the inquiry directed was not what personal estate the testator had at the time of making his will, but what estate he had at his death (^m). [3]

SECT. VIII.

Of an executor's being legatee: and herein, of his assent to his own legacy.

IN case of a legacy bequeathed to the executor, if he take possession of it generally, he shall hold it as executor, which is his first and general authority (^a).

[345] The union of the two characters of executor, and legatee, in one and the same person, makes no difference (^b). His assent is as necessary to a legacy vesting in him in the capacity of legatee, as to a legacy's vesting in any other person, and that on the same principle. Till he has examined the state of

(^m) 1 P. Wms. 305, 306. note 1 and 2. Young v. Holmes, Stra. 70.

(^a) 3 Bac. Abr. 84. 13 Co. 47. Plowd. (^b) Off. Ex. 22.
520. 543. 10 Co. 47 b. Dyer, 277 b.

[3] All the residuary legatees or distributees ought to be parties to a suit for division of a residuum. *Richardson's Ex. v. Hunt*, Munf. Rep. 148. But it is otherwise, where the division of the estate of the testator is not to be made at one and the same time. 3 Munf. Rep. 43.

A legal title to land not expressly mentioned in the will, does not pass by a residuary devise. *Shobe's Ex. v. Carr & Wife*, 3 Munf. Rep. 10.

Nor by a general residuary clause in a will, does the reversion pass after a life estate in the land; there being other property which the testator evidently intended to convey by such clause; and the life estate in the land being created for the benefit of the same persons to whom the residuum was bequeathed. *Philips & Wife v. Melson & al.* 3 Munf. Rep. 72.

This last case must be considered as decided upon its own circumstances; as, in *Kennon v. M'Robert*, 1 Wash. Rep. 111, 112, it is said, that a testator might devise lands for years "or for life, and limit no particular remainder, and in that case the remainder will pass in the residuary clause."

the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy; or whether it must not of necessity be applied in satisfaction of debts^(e).

His assent to his own legacy may, as well as his assent to that of another legatee, be either express, or implied. He may not only in positive terms announce his election to take it as a bequest, but such election may also be implied from his language, or his conduct^(d). As if he say, that he will have it according to the will, that amounts to an assent to have it as legatee^(e). So, if a term be devised to A, the executor, for life, and afterwards to B, if he say that B will have it after him, that implies an election to take it as legatee^(f). So if by deed reciting that he has a term for years by devise, he grants it over^(g); or if he take the profits of it to his own use^(h); or if he repair the tenements devised at his own expense⁽ⁱ⁾; all these acts indicate an assent to the bequest: In like manner, if he perform a condition or trust annexed to the devise; as, if a [346] lessee for years devise his term to his executor, on condition that he shall pay ten pounds to J. S., which he pays accordingly: this payment amounts to an election on his part to take the lease as a legacy, and it is in law an execution of the legacy for ever; for he who performs the charge of a thing claims the benefit which is annexed to it^(k). So, if a lease be devised to an executor during the minority of the testator's son, in order that the executor may educate him out of the profits, if he educate him accordingly, this constitutes an assent to take the lease by way of legacy, and not as executor^(l); or if he excludes a co-executor from a joint occupancy of the term with him^(m), that is also an agreement to the legacy. An assent to take part as a residuary legatee, is an assent also to take the whole residue in the same character⁽ⁿ⁾.

But till the executor has made his election, either express or

^(e) Ibid. 27. 2.

^(h) Ibid. 619.

^(d) Com. Dig. Admon. C. 6, 7. Garret v. Lister, 1 Lev. 25.

⁽ⁱ⁾ Semb. Cheney's Case, 1 Leon. 216.
^(k) Plowd. 544.

^(e) Garret v. Lister, 1 Lev. 25.

^(l) Ibid. 539.

^(f) Garret v. Lister, 1 Lev. 25.

^(m) Dyer, 277 b.

^(g) 1 Roll. Abr. 920.

⁽ⁿ⁾ 2 Roll. Rep. 158.

implied, he shall take the legacy as executor, though all the debts have been paid, independently of such bequest (^o).

Nor is the entry of an executor, whether before or after probate, on the term devised to him, an election to take it as legatee (^p). Nor, if he merely say, that the testator left all to him (^q), will so ambiguous an expression have that effect. Yet if an [347] executor, being also devisee of a term, grant a lease of it by the name of executor, that amounts to a claim in such capacity (^r).

If a legacy be left to A, as executor, whether expressly for his care and trouble, or not, he must prove the will (^s), and either act, or distinctly show his intention to act, before he shall become entitled to it (^t). And although an executor prove the will, yet if he do not appear to have done it with an intention of really acting in the execution of it, he is not entitled to his legacy (^u).

Nor has an executor a right to give himself a preference in regard to a legacy, as in the instance of a debt.

In the case of a legacy to a trustee, given as a token of regard and a recompense for his trouble, payable within twelve calendar months, after the decease of the testatrix, no refusal or neglect to act where necessary appearing, and the trustee dying nineteen months after the testatrix without having acted, the trustee was held entitled to the legacy (^v).

The rules above stated in respect to the abatement and refunding of legacies, in the case of legatees in general, apply equally to the case where the same person is both executor and legatee (^x), and although the bequest were merely as a recompense for his executing the trust (^y).

(^o) Com. Dig. Admon. C. 5. 1 Leon. 216.

Stackpoole *v.* Howell, 13 Ves. jun. 417.

(^p) Com. Dig. Admon. C. 7. Off. Ex. 226.

(^v) Harford *v.* Browning, 1 Cox's Rep. 302. Freeman *v.* Fairlie, 3 Meriv. Rep. 31.

(^q) 1 Roll. Abr. 620.

(^w) Brydges *v.* Wotton, 1 Ves. & Bea. 134.

(^r) 1 Leon. 216.

(^x) 2 Bl. Com. 502. Plowd. 545. in note.

(^s) Reed *v.* Devaynes, 2 Cox's Rep. 285.

(^y) 4 Bac. Abr. 417. Fretwell *v.* Stacy, 2 Vern. 434. Attorney-General *v.* Robbins, 2 P. Wms. 25.

(^t) Reed *v.* Devaynes, 3 Bro. Ch. Rep. 95. Abbot *v.* Massie, 3 Ves. jun. 148. Harrison *v.* Rowley, 4 Ves. jun. 212.

SECT. IX.

Of the testator's appointing his debtor executor—when the debt shall be regarded as a specific bequest to him—when not.

If a creditor appoint the debtor his executor, the effect of such an appointment is to be considered, first at law, and then in equity. In point of law, such nomination shall operate as a [348] release, and extinguishment of the debt; on the principle that a debt is merely a right to recover the amount by way of action, and as an executor cannot maintain an action against himself, his appointment by the creditor to that office discharges the action, and, consequently, discharges the legal remedy for the debt^(a). Thus, if the obligee of a bond make the obligor executor, this amounts to a release at law of the debt^(b): If several obligors be bound jointly and severally, and the obligee constitute one of them his executor, it is an extinguishment of the debt at law, and the executor is incapable of suing the other obligors^(c). The debt is in like manner released where only one of several executors is indebted to the testator, for one executor cannot maintain an action against another^(d); and after the death of such executor, the surviving executors cannot sue his representative for the debt^(e). Nor is the case varied by the executor's dying without having proved the will, or having administered^(f), or even by his refusal to act with his co-executors^(g), unless he formally renounced the office in the spiritual court: such a renunciation, indeed, shall prevent the release of his debt: for he could no more be compelled to accept a release, than a deed of grant^(h).

In all these cases the legal remedy is destroyed by the act

(^a) 3 Bac. Abr. 11. 2 Bl. Com. 511, 512. Off. Ex. 31. Wankford v. Wankford, Salk. 299. Plowd. 186. Com. Dig. Admon. B. 5. Roll. Abr. 920, 921. 5 Co. 30. Harg. Co. Litt. 264 b. note 1.

(^b) 8 Co. 136.

(^c) Off. Ex. 31. 11 Vin. Abr. 398.

(^d) Ibid. 31.

(^e) Ibid. 32. Plowd. 264. Crosman's Case, Leon. 320.

(^f) Wankford v. Wankford, Salk. 300. Plowd. 184. Off. Ex. 31.

(^g) Wankford v. Wankford, Salk. 308.

(^h) Ibid. Salk. 307.

of the party, and, therefore, is for ever gone⁽ⁱ⁾; but the effect [349] is different where it is suspended merely by the act of law^(k); as if administration of the effects of a creditor be committed to the debtor, this is only a temporary privation of the remedy by the legal operation of the grant^(l): Thus, if the obligor of a bond administer to the obligee, and die, a creditor of the obligee having obtained administration *de bonis non* may maintain an action for such debt against the executor of the obligor^(m). So, if the executrix of an obligee marry the obligor, such marriage is no release of the debt, for the testator has done no act to discharge it, and the husband may pay it to the wife in the character of executrix: If he do not, the remedy is suspended merely by the legal effect of the coverture, and on her death, the administrator *de bonis non* of the testator will be equally entitled to that debt, as to any others outstanding⁽ⁿ⁾. It seems also, that the naming of a debtor executor *durante minoritate* is no discharge of the debt, since he is only executor in trust for the infant till he comes of age^(o).

In equity, the consequence of the testator's nominating his debtor executor is to be regarded, first, with reference to creditors; and then, to legatees.

As against the testator's creditors, equity will never permit him, by constituting his debtor executor, to disappoint them: Therefore, where the testator has not left a fund sufficient for the payment of his own debts, in that case, the debt of his executor shall be assets; the duty remaining, although the action at law be gone, and the executor shall be liable to account for such debt in the spiritual court, or in a court of equity. It were highly unreasonable that the claims of creditors should be defeated by a release, which was absolutely voluntary^(p). In respect to legatees, equity will, generally speaking, allow

(i) Dorchester *v.* Webb, Cro. Car. 373.

Wankford *v.* Wankford, Salk. 302.

Abram *v.* Cunningham, 1 Ventr. 303.

(k) Wankford *v.* Wankford, Salk. 303.

(l) Off. Ex. 32. 8 Co. 136.

(m) Lockier *v.* Smith, Sid. 79.

(n) Crosman's Case, Leon. 320. Cros-

man *v.* Reade, Moore, 236. Wankford

v. Wankford, Salk. 306.

(o) 11 Vin. Abr. 400. Caweth *v.* Phillips, Lord Raym. 605.

(p) Wankford *v.* Wankford, Salk. 302. 306. Off. Ex. 31. 2 Bl. Com. 512.

Plowd. 186. Shep. Touch. 497, 498. Simmons *v.* Gutteridge, 13 Vez. 264.

the appointment of a debtor executor to operate as a discharge [350] of his debt. For the debt is considered in the light of a specific bequest or legacy to the debtor, for the purpose of discharging the debt, and, therefore, though like all other legacies, it shall not be paid, or retained till the debts are satisfied, yet the executor has a right to it exclusive of the other legatees (q).

But this rule with reference to legatees, is subject to a great variety of exceptions: In equity such debt shall not be released, even as against legatees, if the presumption arising from the appointment of a debtor to the executorship be contradicted by the express terms of the will: or by strong inference from its contents. As where a testator leaves a legacy, and directs it to be paid out of a debt due to him from the executor; such debt shall be assets to pay not merely that specific legacy, but all other legacies (r). In like manner, if he leave the executor a legacy, it is held to be a sufficient indication, that he did not mean to release the debt. And in such case, the executor shall be trustee to the amount of the debt for the residuary legatee, or next of kin (s). So where a testator bequeathed large legacies, and also the residue of his estate, to his executors, one of whom was indebted to him by bond in three thousand pounds, it was decreed that this debt should be added to the surplus, and that both executors were equally entitled to it (t). So where a debtor to the testator was appointed executor, although without a legacy, yet it appearing by the tenor of the will, that the testator considered him in the light of a mere trustee of his whole property, his debt was clearly held not to be discharged (u). So where A mortgaged his estate to B, who paid no money in consideration of the mortgage, but gave him a bond for 130*l.* and then A died, having appointed B his executor, the bond was decreed to be assets in the hands of B, and applicable, after payment of the funeral ex-

(q) 2 Bl. Com. 512. Harg. Co. Litt. 264 b. note 1.

(r) 3 Bac. Abr. 11. Flud v. Rumsey, *Velv.* 160.

(s) Carey v. Goodinge, 3 Bro. Ch. Rep. 110.

(t) Brown v. Selwyn, Ca. Temp. Talb. 240. 4 Bro. P. C. 180. 3 Bac. Abr. 12.

(u) Berry v. Usher, 11 Ves. jun. 87.

penses and legacies, to the exoneration of the real estate in favour of the heir (w). [1]

[351] SECT. X.

Of the residue undisposed of by the will, when it shall go to the executor—when not.

If the testator make no disposition of the residue, a question arises, to whom it shall belong, and this is a subject which involves in it a great variety of distinctions (a).

The result of the numerous cases on this subject appears to be this:

The whole personal estate of the testator is, in point of law, devolved on the executor; and if after payment of the funeral expenses, testamentary charges, debts, and legacies, there shall be any surplus, it shall vest in him beneficially.

(w) *Fox v. Fox*, 1 Atk. 463.

131. note (k). 3 Bac. Abr. 67. 11 Vin.

(a) 1 P. Wms. 550. note 1. 2 Fonbl. Abr. 407.

[1] In Rhode Island, Maryland, Virginia, South Carolina, and Georgia, it is enacted, that the appointment of a debtor an executor, shall in no case be deemed an extinguishment of the debt, unless it be so directed in the will.

A recovered judgment against B, administratrix of C, and afterwards appointed B executrix, with two executors, of his last will and testament; and died. Held, that by the appointment of the administratrix of C as executrix of A, the judgment was extinguished. *Thompson v. Thompson*, 2 Johns. Rep. 471.

If a debtor be appointed the executor or administrator of his creditor, the debt is not thereby extinguished, but remains as assets for the payment of debts and legacies, or to be distributed among the next of kin. The right of action is suspended, but the acceptance of the trust will make him liable for the amount of such debt, as if he had received it from any other debtor of the deceased. *Stevens v. Gaylord*, 11 Mass. T. R. 256. *Winship v. Briss & al.* 12 Mass. T. R. 199. *Hays & al. v. Jackson*, 6 Ib. 149.

And if a debtor be appointed administrator of his creditor in any state where he has his domicil, and he appropriate the amount of his debt as assets there, or be bound so to appropriate it, he cannot be liable to an action for the same debt, by an administrator in any other state. *Stevens v. Gaylord*, 11 Mass. T. R. 256.

If it shall appear on the face of the will, either expressly, or by sufficient implication, that the testator meant to confer upon him merely the office, and not the beneficial interest, equity will convert the executor into a trustee for those on whom the [352] law would have cast the residue in case of a complete intestacy; that is to say, the next of kin. As, where the testator has styled him in his will an executor in trust, or has used other expressions of the same import^(b). But an executor being called a trustee as to specific trusts imposed upon him distinct from his appointment as executor, will be entitled to the residue, as no inference can be drawn therefrom of the testator's intention to make him a trustee of the residue. And executors taking the residue, take it precisely in the same plight as residuary legatees would take it^(c). Where the testator appointed the American ambassador his executor, or such other person as should be the American ambassador at the time of the testator's death, Sir William Grant, M. R. held that to be a circumstance connected with others indicative of an intention to confer upon him the office only, he being appointed not in his individual character and as a friend, but in the capacity of minister^(d). So, where the testator has begun to make a disposition of the surplus, but has not proceeded to complete it, there also the executor shall be excluded. As where a residuary clause is inserted in the will, and the testator has omitted to name the residuary legatee^(e). But a blank space between the last line of a will and the signature raises no presumption of an intention to dispose of the residue against the legal right of the executor^(f). Where an executor has general and specific

(b) 1 P. Wms. 550, note 1. Pring *v.* Pring, 2 Vern. 99. Rachfield *v.* Careless, 2 P. Wms. 158. Graydon *v.* Hicks, 2 Atk. 18. Dean *v.* Dalton, 2 Bro. Ch. Rep. 634. Bennet *v.* Batchelor, 3 Ero. Ch. Rep. 28. Wheeler *v.* Sheer, Moseley, 288. Lockyer *v.* Simpson, 301. Bennet *v.* Batchelor, 1 Ves. jun. 63.

(c) Pratt *v.* Sladden, 14 Ves. jun. 193. Dawson *v.* Clark, 15 Ves. jun. 409. 18 Ves. jun. 247.

(d) Urquhart *v.* King, 7 Ves. jun. 230. See also Griffiths *v.* Hamilton, 12 Ves. jun. 309.

(e) 1 P. Wms. 550, note 1. Wheeler *v.* Sheer, Moseley, 288. Bp. of Cloyne *v.* Young, 2 Vez. 91. Ld. North *v.* Purdon, 495. Hornsby *v.* Finch, 2 Ves. jun. 78. Vid. also Mordaunt *v.* Hussey, 4 Ves. jun. 117. and Girand *v.* Hanbury, 3 Merl. Rep. 150.

(f) White *v.* Williams, 3 Ves. & Bea. 72. S.C. Coop. Rep. 58.

legacies, not expressly for his care and trouble, upon the evidence raising no direct intention in his favour, but mere inference from equivocal declarations, with an intention to make an express residuary disposition, the executor will be a trustee of the residue^(g). So the executor shall be excluded where the residuary clause is rased and become illegible^(h). Nor where the testator has regularly bequeathed the surplus, although the residuary legatee first die, and consequently it be undisposed of at the time of the testator's death, shall it belong to the executor⁽ⁱ⁾. Nor shall the executor be entitled to it where the testator has given him a legacy expressly for his care and trouble; for that is a strong case on which to raise a resulting trust, not merely on the absurdity of supposing a testator to give a part of the fund to that person for whom he intended the whole, but as it is evidence that he considered him as a trustee for some other, who should be the object of the care and trouble for which the bequest was meant as a compensation^(k). Still, however, the principle, that it shall not be presumed to have been [353] the testator's meaning thus to give part and all to the executor, has been allowed alone and unaided to operate as an exclusion. Hence it is a settled rule in equity, that a pecuniary legacy bequeathed to an executor alone, or to an executor who is also a trustee, affords a sufficient argument to debar him of the residue^(l).

A direction in a will "to keep accounts," was held upon demurrer, to afford a presumption that the executrix was not meant to take beneficially; but parol evidence being admitted on behalf of the executrix, to show that she was intended to

(g) *Langham v. Sandford*, 17 Ves. jun. 435. and on appeal, 19 Ves. 641. 2 Merl. Rep. 6.

(h) *Farrington v. Knightly*, 1 P. Wms. 549.

(i) 1 P. Wms. 550, note 1. *Nicholls v. Crisp*, Ambl. 769. *Bennet v. Batchelor*, 3 Bro. Ch. Rep. 28.

(k) 2 Fonbl. 131. note (k). *Bp. of Cloyne v. Young*, 2 Ves. 97. *Foster v. Munt*, 1 Vern. 473. *Rachfield v. Care-*

less, 2 P. Wms. 158. *Cordell v. Noden*, 2 Vern. 148. *Newstead v. Johnston*, 2 Atk. 46.

(l) 1 P. Wms. 550, note 1. 2 Fonbl. 131. note (k). *Ball v. Smith*, 2 Vern. 676. *Joslin v. Brewitt*, Bunn. 112. *Farrington v. Knightly*, 1 P. Wms. 544. *Davers v. Davers*, 3 P. Wms. 40. Prec. Ch. 107. *Gibbs v. Rumsey*, 2 Ves. & Bea. 294. *Bull v. Kingston*, 1 Merl. Rep. 314.

take the residue for her own benefit; and such evidence being satisfactory, the bill by the next of kin was dismissed (^m).

A bequest, that the whole of the testator's property shall pass by his codicil "according to law," will exclude the executor, and make him a trustee for the next of kin (ⁿ).

If the legacy to the executor be specific, it shall equally exclude him (^o). Nor will the rule be varied by the testator's having bequeathed legacies to the next of kin (^p). For it is founded rather on an implied intent to bar the executor, than to create a trust for the next of kin; and, therefore, if the executor have a legacy, and there be no next of kin, a trust shall result for the crown (^q). It is also settled, that in case the widow of the testator be executrix, she is, in respect to the residue, precisely in the same situation as any other person appointed to the office (^r); unless the bequest to her of a specific legacy, consisting of property which was her's before marriage, may vary the rule (^s).

Executors entitled to the residue undisposed of, will take a legacy to a charity void by the statute 9 Geo. 2. c. 36. for their own benefit, against the claim of the next of kin (^t).

A general devise and bequest to executors, having equal legacies of stock, for mourning, their heirs, executors, &c., on the especial trust to devote all, both real and personal, to debts, legacies, and annuities, is a resulting trust of the residue for the heir at law and next of kin (^u).

In respect to that class of cases in which the executor shall be entitled to the residue, although he be a legatee, it may be

(^m) *Gladding v. Yapp*, 5 Madd. Rep. 56.

(ⁿ) *Ld. Cranley v. Hale*, 14 Ves. jun. 307.

(^o) *Randall v. Bookey*, 2 Vern. 425. *Southcot v. Watson*, 3 Atk. 226. *Martin v. Rebow*, 1 Bro. Ch. Rep. 154.

(^p) 2 Fonbl. 131. note (^k). *Bayley v. Powell*, 2 Vern. 361. *Wheeler v. Sheer, Moseley*, 288. *Andrew v. Clark*, 2 Ves. 162. *Kennedy v. Stainsby*, 1 Ves. jun. 66. in note. *Vid. tam. Attorney-General v. Hooker*, 2 P. Wms. 337.

(^q) *Middleton v. Spicer*, 1 Bro. Ch. Rep. 201.

(^r) *Lady Granville v. Duch. of Beaufort*, 1 P. Wms. 115. 550. note 1. 2 Fonbl. 130, note 1. *Lake v. Lake*, Ambl. 126. 2 Eq. Ca. Abr. 444. *Martin v. Rebow*, 1 Bro. Ch. Rep. 154.

(^s) 2 Fonbl. 130, note 1. 7 Bro. P. C. 511. See *Attorney-General v. Hooker*, 2 P. Wms. 338.

(^t) *Dawson v. Clark*, 15 Ves. jun. 409.

(^u) *Southouse v. Bate*, 2 Ves. & Bea. 396.

[354] stated as an universal rule, that wherever the legacy is consistent with the intent that the executor should take the whole, a court of equity will not disturb his legal right. And therefore, where a gift to an executor is only an exception out of another legacy; as if a library be bequeathed to A, out of which the executor is to select ten books for himself; it shall not exclude him from the residue, inasmuch as it was necessary to make an express exception^(w). Nor where a legacy is given by a codicil to one of two executors^(x). Nor where the executorship is limited to a particular period, or determinable on a contingency, and the legacy to the executor, at the end of such period, or on such contingency's taking place, is bequeathed over, shall it defeat his claim to the surplus^(y). Nor shall a gift of only a limited interest for the life of the executor have that effect^(z). For in these cases the legacy is considered as an exception out of the general gift to the devisee over, and therefore not such a legacy as shall exclude the executor from the residue, since it does not involve the absurdity of giving expressly a part where the whole was intended to be given^(z). But the limited executor has an interest in the residue only while his executorship continues, on the determination of which it devolves on the general executor^(a).

If the executor be an infant, a legacy bequeathed to him shall not, it seems, exclude him from the residue, because his infancy renders him unfit to be a trustee, and, therefore, he shall be intended to have been named for his own benefit^(b).

[355] That parol evidence may be received for the purpose of rebutting a resulting trust, is sufficiently established by a series of cases; but it is admitted with great caution^(c), and

^(w) 1 P. Wms. 550, note 1. *Griffith v. Rogers*, Prec. Chan. 231. 2 Eq. Ca.

Abr. 444. pl. 58. *Newstead v. Johnston*, 2 Atk. 45. *Southcot v. Watson*, 3 Atk. 229. Vid. also 7 Bro. P. C. 511.

^(x) *Pratt v. Sladden*, 14 Ves. jun. 193. ^(y) 2 Fonbl. 131, note ^(k). *Hoskins v. Hoskins*, Prec. in Chan. 263.

^(z) 2 Fonbl. 131, note ^(k). *Lady Granville v. Duch. of Beaufort*, 1 P. Wms. 114. *Jones v. Westcomb*, Prec. Chan. 316. *Nourse v. Finch*, 1 Ves. jun. 356.

^(a) 1 P. Wms. 116, note 1.

^(b) *Vid. Prec. in Chan. 264.*

^(c) *Lamplugh v. Lamplugh*, 1 P. Wms. 112. See also *Blinkhorn v. Feast*, 2 Vez. 30.

^(d) 2 Fonbl. 135, note 1. *Rochfield v. Careless*, 2 P. Wms. 158. 160. *Duke of Rutland v. Duchess of Rutland*, 210. *Nichols v. Osborn*, 420. *Blinkhorn v. Feast*, 2 Vez. 28. *Nourse v. Finch*, 1 Ves. jun. 358.

although not restricted to what passed at the time of making the will (^d), yet must point to the testator's intention at that time only: evidence of his subsequent intention will have no effect (^e). Nor shall parol evidence for such purpose be admitted, where the executor is declared by the will to be a trustee; or where the bequest to the executor is expressed in terms equivalent to such declaration, as where the legacy is given to him for his care and trouble in fulfilling the will (^f). [1]

(^d) *Sed vid. Duke of Rutland v. Duch. of Rutland*, 2 P. Wms. 209. *Nourse v. Finch*, 1 Ves. jun. 359.

(^e) *Lake v. Lake*, 1 Wils. 313 Ambl. 126. *S. C. Clennel v. Lewthwaite*.

Decreed per M. R. 2 Ves. jun. 465.

Decree affirmed by Lord Chancellor, ibid. 644. *Walton v. Walton*, 14 Ves. jun. 318.

(^f) *Rochfield v. Careless*, 2 P. Wms. 158.

[1] In the following states, the right of the executor to the undisposed residue is taken away by statute: Vermont, Rhode Island, New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina. *Quære*, whether commissions for the care and trouble of the executor do not in all cases exclude his claim to the undisposed residue.

An executor has always been considered by the law of Pennsylvania a trustee for the next of kin, as to all the residue of personal property undisposed of by the testator. *Wilson v. Wilson*, 3 Binn. 557. And as far back as the testamentary laws, he has always had a compensation for his services. 3 Binn. 560. Ibid.

CHAP. V.

OF THE INCOMPETENCY OF AN INFANT EXECUTOR—OF THE ACTS OF AN EXECUTOR DURANTE MINORITATE—OF A MARRIED WOMAN EXECUTRIX—OF CO-EXECUTORS—OF EXECUTOR OF EXECUTOR—OF EXECUTOR DE SON TORT.

AN infant, as it has been already stated (^a), is now by the stat. 38 Geo. 3. c. 87. incapable of the functions of an executor, till he shall have attained his full age of twenty-one years. Nor before the passing of this statute was an infant competent to act, till he had arrived at the age of seventeen (^b); but at that age he had a right to assume the executorship. He had authority to sell the testator's effects, to pay and receive debts, to assent to and pay legacies, and, generally, to discharge the duties which belong to the representatives of the deceased (^c). Yet, if an infant executor, after the age of seventeen, and before the age of twenty-one, years, released a debt due to the testator without actually receiving it, such a release was held to be void: or if he received only a part of it, it was void for [357] the remainder; for otherwise he would have been divested of that privilege which the law allows to all infants, of rescinding their acts when they are manifestly to their disadvantage. Nor could a proceeding, prejudicial both to the infant and to the estate, be regarded as pursuant to his office (^d). On the same principle the assent of such infant executor to a legacy did not bind him, unless he had assets for the payment of debts (^e). Nor had he a power of committing any other act which might involve him in the consequences of a *devastavit* (^f).

(^a) Supr. 31. 101.

(^b) Off. Ex. 214. 1 Roll. Abr. 730. Sed vid. Cleke *v.* Hopkins, Cro. Eliz. 254. Manning's Case, 3 Leon. 143. Keilw. 51. Foxwist *v.* Tremaine, 2 Saund. 212. 1 Bl. Com. 463.

(^c) 3 Bac. Abr. 8. Off. Ex. 215. 217, 218. Com. Dig. Admon. E.

(^d) 3 Bac. Abr. 8. 5 Co. 27. Off. Ex. 217, 218. Com. Dig. Admon. E. Russel's Case, Moore, 146. Knot *v.* Barlow, Cro. Eliz. 671. Kniveton *v.* Latham, Cro. Car. 490.

(^e) Off. Ex. 217. 225.

(^f) Whitemore *v.* Weld, 1 Vern. 328.

Nor, in a late case, would the Court of Chancery direct money to be paid to an infant executor, although he had attained the age of seventeen; but referred it to a master to inquire, whether there were any debts or legacies, and to consider of a maintenance (^g).

But these distinctions it is now needless to discuss, the statute having altogether disqualified an infant executor from exercising the office during his minority, and having directed administration with the will annexed to be granted to some other person in the interim (^h).

If A appoint B, an infant, his executor, and C executor during the minority of B, C, though only a temporary executor, seems, during the continuance of his office, to be invested with [358] the same powers as belong to an absolute executor; and although he be named in the will administrator only for the benefit of the infant (ⁱ).

In case a married woman be executrix, the husband, as we have before seen (^k), has a right to act in the administration with or without her consent. He is empowered to reduce into possession, or to dispose of the property by way of gift, sale, surrender, or release; to receive and pay debts; to assent to and pay legacies; and to elect for his wife to take as legatee (^l). And his assets are chargeable in equity for waste committed during the coverture (^m). On the contrary, such acts, if performed by her without his permission, are of no validity (ⁿ). If the husband be abroad, the Court of Chancery will restrain the executrix from getting in the assets of the testator, and appoint a receiver for that purpose, with power to commence suits for the recovery of debts due to the estate (^o).

And this doctrine is founded on the principle, that as he is personally responsible for such acts, the law makes it essential to their validity, that they should be performed by him, or at

(^g) *Campart v. Campart*, 3 Bro. Ch. Rep. 195

(^h) *Vid. supr. 31. 101.*

(ⁱ) *Off. Ex. 215, 216. Com. Dig. Admon. F.*

(^k) *Supr. 241.*

(^l) *Com. Dig. Admon. D. Off. Ex.*

207, 208. *Wankford v. Wankford*, 1 Salk. 306.

(^m) *Adair v. Shaw*, 1 Sch. & Lef. 243.

(ⁿ) *3 Bac. Abr. 9. Keilw. 122. Off. Ex. 207, 208. Vid. Anders. 117. 1*

Roll. Abr. 924.

(^o) *Taylor v. Allen*, 2 Atk. 213.

least with his concurrence : otherwise the misconduct of the wife in the executorship might be extremely prejudicial to the husband (^p).

Yet, if an executrix marry, and the husband eloin the goods, or is guilty of any other species of *devastavit*, it will be a *devastavit* also by the wife, and they will be both answerable accordingly (^q). On the other hand, if an executrix commit a *devastavit*, and then marry, the husband, as well as the wife, is chargeable for it during the coverture (^r). And where an executrix marries, and her husband and she admit assets in answer to a bill filed against them ; the assets become a debt of the husband in respect of such admission, and may be proved under a commission of bankruptcy issued against him (^s).

If the testator were indebted to the husband, or, which is the same thing, to the wife before marriage, the husband may retain.

If the husband were indebted to the testator, the making of the wife executrix is equally a release of the debt, as if she had been the debtor ; although if an executrix after the death of the testator marry such debtor, it will be a *devastavit* (^t).

If specific legacies are left to a husband and wife jointly, and they are named executors, such legacies shall exclude them from the residue, for they are analogous to a specific legacy to a sole executor (^u).

Co-executors, we may remember, are regarded in law as an individual person (^w) ; and, by consequence, the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all : for they have a joint and entire authority over the whole property (^x). Hence a release of a debt by one

(^p) Off. Ex. 207, 208. 225. 1 Fonbl. 84. 86. 5 Co. 27.

(^s) Matter of M'Williams, 1 Scho. & Lef. 173.

(^q) Com. Dig. Admon. D. Cro. Car. 510. Dyer, 210, in marg. Beynon v. Gollins, 2 Bro. Ch. Rep. 323. Adair v. Shaw. 1 Sch. & Lef. 257.

(^r) Off. Ex. 207.

(^t) Com. Dig. Baron & Feme, N. King v. Hilton, Cro. Car. 603. Heyward's Case, Moore, 761.

(^u) 1 P. Wms. 550, note 1. ad fin. Willis v. Brady, Barnard. 64.

(^w) Vid. supr. 37. 243.

(^x) 3 Bac. Abr. 30. Off. Ex. 95. 1 Roll. Abr. 924. Com. Dig. Admon. B. 12.

[360] of several executors is valid, and shall bind the rest (^y). So a grant, or a surrender of a term by one executor shall be equally available (^z). It has been likewise held, that if one confess a judgment, the judgment shall be against all (^a). But, on the contrary, where there were three executors, one of whom gave a warrant of attorney to confess judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris* for the debt, and against the executor who gave the warrant *de bonis propriis* for the costs ; it was set aside, on the ground that executors may plead different pleas, and that which is most for the testator's advantage shall be received (^b). If one executor grant or release his interest in the testator's estate to the other, nothing shall pass, because each was possessed of the whole before (^c). It has been adjudged also, that if one of two executors appointed by the obligee deliver the bond to a stranger in satisfaction of a debt due from himself, and die ; although the debt as a chose in action could not pass by the assignment, yet by this delivery the party had such an interest in the instrument, that he might justify the detention of it as against the surviving executor (^d) ; but the law of this case seems very dubious, inasmuch as the debt, not being assignable, could not pass by the delivery of the obligation (^e).

[361] One executor shall not be allowed to retain his own debt in prejudice to that of his co-executor in equal degree, but both shall be discharged in proportion (^f).

An assent to a legacy by one of several executors is sufficient (^g). And if there be a devise to all the executors generally, one of them may assent for his part (^h).

Co-executors, as well as a sole executor, shall be excluded

(^y) Dyer, 23 b. Jacomb *v.* Harwood, 2 Vez. 267.

(^z) Ibid. 23 b.

(^a) Ibid. 23 b. in note.

(^b) Elwell *v.* Quash, Stra. 20. Vid. Baldwin *v.* Church, 10 Mod. 323. Hudson *v.* Hudson, 1 Atk. 460. Heister *v.* Kuipe, 1 Browne, 319.

(^c) Godolph. 134. 3 Bac. Abr. 31.

(^d) 2 Roll. Abr. 46. Dyer, 23 b. Kellock *v.* Nicholson, Cro. Eliz. 478. S. C. 496.

(^e) 3 Bac. Abr. in note.

(^f) 2 Fonbl. 407, note (^l). 11 Vin. Abr. 72. 3 Bl. Com. 19.

(^g) Com. Dig. Admon. C. 8. Off. Ex. 225.

(^h) 1 Roll. Abr. 618.

from the residue, either in case the testator shall have expressly described them as mere trustees; or, according to the fair construction of the will, appears to have so considered them; or in case he has made an imperfect disposition of the residue, as where he has inserted a residuary clause without proceeding to specify the residuary legatee; or where he hath bequeathed the surplus to a party, who died before him⁽ⁱ⁾.

If a legacy be given to one executor expressly for his care and trouble, and no legacy given to his co-executor, they shall both be barred of the residue^(k). For one being a trustee, the other must be a trustee also. Yet if there be two or more executors, a legacy to one expressed to be a testimony of regard, and immediately following a particular trust imposed upon him by the will, shall not exclude them from the residue^(l), nor shall even a simple legacy to one of them have that effect; for the testator may have intended a preference to him to that extent^(m). [362] So, where several executors have unequal legacies, whether pecuniary, or specific, they shall nevertheless be entitled to the surplus⁽ⁿ⁾. But where equal pecuniary legacies are given to co-executors, a trust shall result for the next of kin^(o). The arguments which have been urged in opposition to this rule, and to show that the giving of equal pecuniary legacies to several executors, is not absolutely inconsistent with an intention that they should take the surplus, are, that such gift would secure to them a proportion of their legacies in the event of a deficiency of assets, which applies equally to the case of a sole executor; and that they would take the legacies severally, whereas the residue would belong to them jointly: Yet the rule has long prevailed as above stated^(p). No case, however, occurs in the books, in which distinct specific legacies of equal

(i) 1 P. Wms. Petit *v.* Smith, 7. & 550, note 1. 2 Fonbl. 133, in note.

(k) 2 Fonbl. 133, in note. White *v.* Evans, 4 Ves. jun. 21.

(l) Griffiths *v.* Hamilton, 12 Ves. jun. 298.

(m) 1 P. Wms. 550, note 1. Colesworth *v.* Brangwin, Prec. Chan. 323. 4 Bro. P. C. 1. Bishop of Cloyne *v.* Young, 2 Ves. 91. Wilson *v.* Iyat, ib.

166, 167. 2 Fonbl. 133, in note. Buffar *v.* Bradford, 2 Atk. 220.

(n) 1 P. Wms. 550, note 1. Brasbridge *v.* Woodroffe, 2 Atk. 69. Bowker *v.* Hunter, 1 Bro. Ch. Rep. 328. 2 Fonbl. 134, in note. Blinkhorn *v.* Feast, 2 Ves. 27.

(o) Petit *v.* Smith, 1 P. Wms. 7. Carey *v.* Goodinge, 3 Bro. Ch. Rep. 110.

(p) 1 P. Wms. 550, note 1.

value to several executors have excluded them from the residue. And the argument which supports the rule as to pecuniary, by no means applies with equal force to specific legacies, since it is very probable that a testator may wish to distribute specific quantities of stock, or particular debts, among his executors in some particular manner, although equal in point of value, and consistently with an intention that they should take the surplus^(q).

Nor does the case just mentioned^(r), of specific legacies [363] queathed jointly to a husband and wife, who are named executors, bear upon the point; for, as it was before observed, it is similar to that of a specific legacy to a sole executor^(s).

Co-executors taking a residue in that character take as joint tenants; therefore, if one of them die before severance, his share shall survive^(t).

The power of an executor is not determined by the death of his co-executor, but survives to him; and, therefore, it is held he may assent to a legacy^(u). Whether a power of selling land, of which I shall presently speak, given to co-executors, is in strictness of law capable of being exercised by the survivor, is a point on which there are opposite authorities^(v). Nor is it now material to resolve it, as such power, although extinct at law, would certainly be enforced in equity, which considers the application directed by the testator of the money arising from the sale to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees, in conformity to the rule that a trust shall never fail of execution for want of a trustee; and that if there be one wanting, the court will execute the office. The relief is administered by regarding the land, in whatever person vested, as bound by the [364] trust, and compelling the heir, or other person having the legal estate, to perform it^(x).

^(q) Ibid. 2 Fonbl. 134, in note.

^(r) Supr. 359.

^(s) 1 P. Wms. 550, note 1. ad fin. Willis v. Brady, Barnard. 64.

^(t) Frewin v. Rolfe, 2 Bro. Ch. Rep. 220. Griffiths v. Hamilton, 12 Ves. jun. 298.!

^(u) Com. Dig. Admon. B. 12. Flanders v. Clarke, 3 Atk. 509. S. C. 1 Ves. 9.

^(v) Harg. Co. Litt. 113. and note 2. 1 Dy. 177. Moore, 61. Perk. S. 550. Bro. Abr. Devise. 50. Howell v. Barnes, Cro. Car. 382. Barnes's Case, W. Jones, 352.

^(x) Harg. Co. Litt. 113, note 2.

As a mediate or remote executor has the same interest in the effects of the original testator as the immediate executor, he is invested with the same authority and privileges, and is bound to administer such effects in the same manner^(y). But in cases of special trust confided to the executor without the ordinary limits of his duty; as to sell land, and the like; if it be not performed by the original executor, some books allege that no successive executor, as such, shall have authority for that purpose^(z). On the other hand, it has been held that such a power of selling given to an executor is transmissible in the way of succession in *infinitum*, till executed^(a). But this point is of no more importance than that just mentioned, and for the same reason. [1]

(y) Com. Dig. Admon. G. Off. Ex. 257,
258 Shep. Touch. 464.

(a) Harg. Co. Litt. 113, note 2. Keilw.
44. 2 Brownl. 194. Dyer, 210. 371 b.

(z) Off. Ex. 258, 259.

[1] In Pennsylvania, by Act of 31st March, 1792, where a naked authority only is given to sell lands, the executors shall take and hold the same interest in such lands, and have the same power and authority respecting the same, as if such lands were devised to them to be sold, saving to the testator the right to direct otherwise; and the law was so settled before the passing of the Act of 1792, by the case of *Lloyd's Less. v. Taylor*, 2 Dall. 223.

Prior to the Act of 12th March, 1800, where power had been given to executors to sell, and they renounced, administrators *cum testamento annexo* could not sell, although for the payment of debts. *Moody & al. v. Vandyke & al.* 4 Binn. 31. By that Act, where real estate is devised to be sold, if one or more of the executors die, or refuse, or renounce, or be dismissed, the survivor or survivors, or the acting executor, may bring actions for the recovery thereof, or against trespassers thereon, may sell, and convey, and manage the same, as fully and completely as might have been done, if the deceased executors were living. And in case of the death, or renunciation, or removal, of all the executors, like powers are given to the administrator with the will annexed.

A sale of lands by an executor for the payment of *debts*, under a power in the will for the payment of *legacies*, is not valid against creditors. *Hannum v. Spear*, 2 Dall. 291. S. C. 2 Yeates, 553. But where a power is given by the will to sell for the payment of *debts*, and the executor applied the proceeds to the payment of the debts according to their priority and dignity, it *seems*, the purchaser will hold the land discharged of the debts. *Ibid.*

Though in general a power given to three to sell cannot be executed by less than three, yet, where authority is given to executors *virtute officii*, a surviving executor may make sale. *Zebach v. Smith*, 3 Binn. 60. *Jenkins v. Stouffer &*

If an executor who has not proved, assist his co-executor who has, in writing letters to collect debts, or by writing directly to a debtor of the testator requiring payment, it will not be considered by the court as acting, so as to charge him^(b).

In respect to an executor *de son tort*, he may perform a variety of acts, which shall be as binding as those of a rightful executor^(c). As against creditors, he is justified in paying the debts of the deceased^(d), and, indeed, may be compelled to pay [365] them so far as assets come to his hands^(e); and to an ac-

^(b) *Orr v. Newton*, 2 Cox's Rep. 274.

^(d) Off. Ex. 181, 182.

^(c) 5 Bac. Abr. 25. Off. Ex. 180.

^(e) 2 Bl. Com. 507. Dyer, 166 b.

al. 3 Yeates, 103. A power to A, his executors and administrators, to sell, may be executed by the executor of A's executor. *Smith v. Folwell*, 1 Binn. 156.

If by a devise executors are directed to sell lands, they cannot convey to a person, to enable such person to bring an ejectment for the lands. *Carroll's Less. v. Andrew*, 4 Har. & M'Hen. 485.

If two executors are authorized by a will to sell and convey lands, and one of them relinquishes the trust after letters granted, and the other sells and conveys the land, the trust is well executed. *Digge's Less. v. Jarman*, 4 Har. & M'Hen. 485. Sed contra, *Nelson v. Carrington*, 4 Hen. & Munf. 332.

But where a will directs the sale and conveyance of land by executors in general terms, a conveyance by two out of three executors, all of whom are qualified and are living, is not valid in law, and cannot be aided in equity. *M'Rae v. Harrow*, 3 Hen. & Munf. 444.

A purchase of land by an executor, which had been sold by him agreeably to the will of his testator, is valid, if it appear that his conduct in the sale was fair and correct. *M'Kay, Ex. of Fouqua v. Young*, 4 Hen. & Munf. 430.

In Vermont, if joint power to execute certain trusts in a will be committed to two or more trustees or executors, if one or more of them shall leave the state, the trust may be executed by the trustees or executors remaining in the state, the survivor or survivors of them. And in case of joint administrators, the removal of one of them from the state, or his death, may be supplied, by the judge of probate empowering the remaining or surviving administrator to perform all acts pertaining to such administration.

If an executor be authorized by the will to sell lands of the testator for the payment of debts, a descent from, or an alienation by devisees, will not take from him the power to sell the lands. *Gore v. Brazer*, 3 Mass. T. R. 541. But he cannot convey or release any right or interest which the testator had in lands of which he was not seised at the time of making his will, or at the time of his decease. *Poor & al. v. Robinson*, 10 Mass. T. R. 131.

tion brought against him by a creditor, he may plead *plenè administravit* (^f).

In case the rightful representative shall think fit to pursue his legal remedy against such an intruder, he has no defence ; as, if it be by action of trover for the goods of the testator, the executor *de son tort* cannot plead payment of debts to the value, or that he hath given the goods in satisfaction of the debts ; for he had no right to interfere.

Yet, on the general issue pleaded, he may give in evidence such payments, and they shall be deducted from the damages (^g) ; or, if they amount to the full value, the plaintiff shall be nonsuited (^h). But it may be doubted, whether in such action the defendant can give in evidence payment of debts to the value of such goods as are still in his custody, or only of those which he has sold (ⁱ). If the action be trespass instead of trover, payment of debts to the value will go only in mitigation of damages (^k), and the plaintiff will be entitled to a verdict.

The ground of the distinction seems to be this : in trover, his possession is admitted to have been lawful, and the subsequent distribution negatives the conversion ; but in trespass, the un-[366] lawful taking is the subject matter of complaint, to which the distribution is not an answer.

Nor in any case shall such payments be allowed to nonsuit the plaintiff, or to lessen the damages, if there be a failure of assets, and the lawful executor would by these means be divested of his right of preferring one creditor to another of equal rank, or giving himself the same preference (^l).

Nor shall an executor *de son tort* derive any advantage from the wrongful character which he has assumed. He is not entitled to bring an action in right of the deceased (^m) ; nor is he empowered to retain in satisfaction of his own debt : for such a privilege would enable him to profit by his own tortious acts,

(^f) 3 Bac. Abr. 25. 5 Co. 30. Off. Ex. 181. Whitehall v. Squire, Carth. 104. Sid. 76.

(^g) Com. Dig. Admon. C. 3. 3 Bac. Abr. 25. Carth. 104. Skin. 274. pl. 2. Off. Ex. 182. Anon. 1 Ventr. 349, 350. 2 Bl. Com. 508.

(^h) L. of Ni. Pri. 48.

(ⁱ) Ibid. Parker v. Kett, 12 Mod. 471.

(^k) L. of Ni. Pri. 48. 91. Ca. B. R. 441.

(^l) 2 Bl. Com. 508. Off. Ex. 182.

(^m) 2 Bl. Com. 507. Bro. Abr. tit. Admon. 8. 11 Vin. Abr. 222. 2 Anders. 39. pl. 25.

and would tend to encourage a competition of creditors, who should first take possession of the testator's effects without any legal authority (^a).

There is, indeed, one exception to this rule; a party who by stat. 43 *Eliz.* c. 8. (^b) becomes an executor *de son tort*, in consequence of a gift to him of the intestate's effects by an administrator, who has obtained the grant fraudulently, is by the express provision of that act allowed to retain. But in all other instances, an executor *de son tort* is excluded from this [367] advantage. Nor shall he retain for his own debt, even against a creditor of inferior degree (^c). Nor, after an action brought against him by a creditor, can he avail himself of a delivery over of the effects to the rightful administrator, though before the filing of the plea; nor of the assent of the administrator to his retainer of his debt. Nor is the case varied, although in point of fact no administration were granted at the time of the commencement of such suit, and the defendant without delay relinquished the property to the grantee (^d).

If the executor *de son tort* deliver the effects to the administrator before such action brought, that is a sufficient defence, and he may give it in evidence on the plea of *plene administravit* (^e).

The grant of administration to such executor shall legalize his previous acts (^f). Thus, where he takes possession of the testator's goods, and sells them, and afterwards is appointed administrator, such subsequent grant shall make the sale effectual (^g). So if A be ordered by B to sell the effects of the intestate, and B afterwards take out administration; A, to an action brought against him by a creditor, may plead *plene administravit*, and shall be discharged on this evidence (^h). An ad-

(^a) 2 Bl. Com. 511. 5 Co. 30. Moore, 527.

(^b) See Com. Dig. Admon. C. S. Off. Ex. 182, 183. 2 H. Bl. 26. in note, & vid. supr. 39.

(^c) 3 Bac. Abr. 25. 5 Co. 30. Ireland v. Coulter, Cro. Eliz. 630. 1 Roll. Abr. 922.

(^d) Curtis v. Vernon, 3 Term Rep.

587, affirmed in Exch. Cham. 2 H. Bl. 26.

(^e) Anon. 1 Salk. 313.

(^f) Com. Dig. Admon. C. S. Kenrick v. Burgess, Moore, 126. Curtis v. Vernon, 3 Term Rep. 590. 2 H. Bl. 25. Ratton v. Overacker, 8 Johns. Rep. 126.

(^g) Moore, 126.

(^h) Whymore v. Porter, Cro. Car. 88.

[368] ministration, also, committed to an executor *de son tort*, and although committed to him *pendente lite*, shall warrant his retainer of his own debt, on the same principle of necessity on which such right of executors is in general founded, namely, to avoid the inconvenience and absurdity of a party's instituting a suit against himself^(x). So, where A, entitled to administration, was opposed in the ecclesiastical court, and, *pendente lite*, being sued as executor in the Court of King's Bench, pleaded a retainer for a debt due to himself, to which the plaintiff replied, that the defendant was executor *de son tort*; the defendant rejoined, that letters of administration had been granted to him *puis darrein continuance*; on demurrer the plea was allowed, and judgment given for the defendant^(y). But if A dispose of an intestate's goods to B, for the payment of the funeral, and afterwards take administration, it has been held, he shall not have an action of trover against B for the goods^(z).

(x) 2 H. 11. 25. arguendo. Com. Dig. Admon. C. 3. Pyne *v.* Woolland, 2 Ventr. 180. Sty. 337.

(y) 3 Bac. Abr. 26, in note. Vaughan *v.* Browne, 2 Stra. 1106. Andr. 328. S. C. 3 Term Rep. 588. S. C. cited

L. of Ni. Pri. 143, 144.

(z) P. per two just. Holt, C. J. contr. Whitehall *v.* Squire, Salk. 295. S. C. Skin. 274. Vid. S. C. Carth. 104. and supr. 244.

CHAP. VI.

OF DISTRIBUTION. [1]

SECT. I.

Of distribution under the statute—and herein of advancement.

I AM now to discuss the power and duty of an administrator. His office, so far as it concerns the collecting of the effects, the

[1] There is much diversity in the several states, in the distribution of the property of intestates. We shall endeavour to give as clear a view of the law in each of them, on this important subject, as the limits of a note will admit.

It will be proper to premise, that the feudal law of primogeniture does not exist in any of the United States; that real as well as personal property is subjected to statutory distribution; and that the heir at common law must bring his advancement into *hotchpot*, as other children.

In Vermont, the real and personal estate is divided in equal portions to the male and equal portions to the female children; but the males take double the portion of the females. But this inequality of distribution is not preserved where the intestate leaves no children, the estate being distributed equally among the next of kin. The widow takes one-third of the real estate for life, and one-third of the personal estate absolutely. Antinuptial children, recognised by the father, are legitimised; and bastards inherit, and transmit inheritances on the part of the mother, as if lawfully begotten.

The share of a child dying under age and unmarried, passes to his surviving brothers and sisters, or their legal representatives, the brothers taking double portions. And, if a child die intestate, after attaining full age, living the mother, she takes equally with the sisters.

If a person die leaving no issue nor widow, the father takes the whole estate; if he leave a widow, but no issue, she takes one-half of the real and personal estate for ever: the other half passes to the father. If the father be dead, and the mother living, she takes a share equally with the sisters.

If the intestate die without heirs, living the wife, she takes the whole of the real and personal estate for ever; giving bond to refund, on the appearance of any heir, devisee, or legatee.

The *surplusage* of every estate subject to distribution is charged with the maintenance of the intestate's children, until they attain the age of seven years; after which, each is to be supported from its particular portion.

making of an inventory, and the payment of debts, is altogether the same as that of an executor. But as there is no will to di-

In other respects, the statutes regulating descents and distribution are similar to the stat. 22 & 23 Car. 2.

In New Hampshire, inheritances in fee simple descend, upon intestacy, in equal shares to the children, and to the representatives of such of them as may be dead ; and if there be no children, then to the next of kin in equal degree, or to their representatives ; but no representation is admitted beyond nephews and nieces.

If any of the children die in their minority unmarried, their shares go to the other children and their representatives ; but if any of them die after majority unmarried, living the mother, she inherits equally with the surviving children.

If one die, of full age, without issue, living the father and widow, she takes one-third during life ; the remainder goes to the father in fee. But if the father be dead, and mother living, she takes equally with the brothers and sisters, and their representatives.

There is no distinction between the half and the whole blood.

The surplusage of the personal estate is distributed as the real, except that if there be children, the widow takes one-third, if none, one-half, absolutely.

As in Vermont, the surplusage of every intestate estate is chargeable with the maintenance of the children, until they respectively attain the age of seven years.

In Massachusetts, inheritances in fee simple, or for the life of another, in case of intestacy, descend in equal shares to the children, and to the lawful issue of any deceased child ; if there be no issue, then to the father ; if there be no issue nor father, then to the mother, and brothers and sisters, and their representatives, in equal portions. In default of brothers and sisters, and their representatives, then to the mother. If there be no mother, then to the intestate's next of kin, in equal degree ; the collateral kindred claiming through the nearest ancestor to be preferred to the collateral kindred claiming through a common ancestor more remote ; the degrees of kindred, in all cases, to be computed according to the rules of the civil law. In default of kindred, escheat to the commonwealth, saving to the widow her dower, and to the husband his courtesy.

The half-blood inherit equally with the whole, unless the estate came from the father or mother, in which case the child of the father or mother shall inherit exclusively.

If the kindred of the intestate are all related to him in the same degree, they take *per capita*, or equally ; otherwise, *per stirpes*, according to the right of representation.

All gifts or grants of real or personal estate, made by the intestate to a child or grandchild, which shall be expressed in the gift or grant, or charged by the intestate in writing, or acknowledged by the child or grandchild in writing, as

rect the subsequent disposition of the property, at this point they separate, and must pursue different courses.

made for an *advancement* of such child or grandchild, shall be brought into general distribution at the value expressed in the grant, charge, or acknowledgment, or at the value when given.

The surplusage of the personal estate is distributed as the real, except that the husband is entitled to the whole of the residue, and the widow to one-third if there be issue, and to one-half if there be none. In the real estate, she is entitled to her dower as at common law, even though she be an alien.

If a child die before the age of twenty-one years, unmarried, his share descends equally among his surviving brothers and sisters, and such as legally represent them; if after that age, unmarried, intestate, and without issue, living the mother, every brother and sister shall inherit equally with the mother.

In Connecticut, real and personal estate are subject to like distribution. The children, or if any be dead, their representatives, take in equal shares; those who have been advanced bringing the value of their advancement into general distribution; the male heirs to have their part in real estate, so far as is practicable. If any of the children die before majority and before marriage, or before any legal disposition thereof and before marriage, the portion of such child shall be equally divided among the surviving children, and their legal representatives.

If there be no children, nor legal representatives of them, then one moiety of the personal estate goes to the wife for ever, and one-third of the real estate during life; the residue, real and personal, to the brothers and sisters of the whole blood, and their representatives; in default of such kindred, then to the parent or parents; if there be no parents, then equally to the brothers and sisters of the half-blood, and their representatives; in default of these, then equally to the next of kin, in equal degree. Kindred of the whole blood are preferred to those of the half-blood, in equal degree; and representation is not admitted among collaterals, after the representatives of brothers and sisters.

Provided that real estate, descended from the part of any ancestor, shall go 1. to the brothers and sisters of the intestate, and their representatives, of the blood of such ancestor; 2. in default of these, to the children or their representatives of such ancestor; and 3. in their default, then to the brothers and sisters and their representatives of such ancestor; and in default of all, then to be divided in the same manner as other real estate. If there be no widow, the whole of the estate is to be divided as above.

In Rhode Island, the real estate of the decedent is distributed, subject to the widow's dower, equally among the children, and their representatives if any of them be dead; if there be no children, then equally among the next of kin of equal degree, and their representatives; but no representation is admitted among collaterals beyond nephews and nieces.

Aster the ordinary was divested of the power of administering an intestate's effects, and compelled, in the manner above

If any of the children of the intestate die without issue in the lifetime of the mother, the brothers and sisters, and their representatives, inherit equally with the mother.

There is no distinction between the whole and the half-blood, except where the estate has descended *ex parte paternā*, or *ex parte maternā*, in which case the estate cannot pass to the half-blood.

Personal estate is distributed as real, except that if the intestate die without issue, the widow takes one-half, instead of one-third, of the personal estate, for ever.

In New York, the real estate of an intestate descends to his issue of the same degree of consanguinity, however remote from the ancestor, in equal parts; if the issue be of different degrees of consanguinity, those nearest take *per capita*, and the issue of those who are deceased, of the same degree of kindred, take *per stirpes*, or that share only which their deceased parent would have taken had he been living.

If the intestate die without issue, living a father, he takes in fee simple, unless the estate came on the part of the mother, in which case it descends as if the intestate had survived the father.

If there be no father, the brothers and sisters take equally, if any of the brothers or sisters be dead, leaving issue, such issue takes equally the share which their parent would have taken had he survived the intestate. No distinction is made between the whole and the half-blood, unless the estate came from an ancestor, in which case those not of the blood of the ancestor are excluded. Posthumous children inherit as if born in the lifetime of the father.

In all cases of descent not particularly provided for by the statute, the common law prevails.

The widow is entitled to her dower, and one third of the surplusage of the personal estate, if there be children; if no children, then a moiety. The residue of the personality is distributed equally among the next of kin of equal degree and their representatives, but no representation is admitted among collaterals after brothers' and sisters' children: If there be no wife, the estate is distributed equally among the children; if no child, then to the next of kin in equal degree and their representatives.

If after the death of a father, any of his children die intestate without wife or children, living the mother, she takes equally with the brothers and sisters, and their representatives.

In New Jersey, the intestate's lands, &c. are distributed equally among his children, living at his death, and the representatives of such as may have died before him, in equal parts. If any of the issue of the intestate have been advanced during his life, such issue must bring his advancement into the general distribution, or forego his part thereof; and posthumous children inherit as if they were born in the lifetime of their respective fathers.

mentioned (^a), to delegate such authority to the relations of the deceased, the spiritual court attempted to enforce a distribution,

(^a) Supr. 80. et seq.

In default of issue, the brothers and sisters of the whole blood take as tenants in common in equal parts; if any of them die before the intestate, leaving children, such children take the portion their parent would have taken, in equal parts; and the same rule is observed in case of the death of any child of such brother or sister before the intestate.

If the intestate die, leaving no issue, nor brother nor sister, nor issue of brother or sister, the inheritance goes to the father, unless it came from the part of the mother, in which case it shall descend as if the intestate had survived his father.

If there be no father, but brothers or sisters of the half-blood, the inheritance descends to them in equal parts, and to their children, under the rules which regulate the descent to the whole blood. Provided, that the inheritance do not come from any ancestor of the intestate; in such case, none who are not of the blood of such ancestor can inherit.

And in default of brothers or sisters of the half-blood, if the intestate left several persons, all of equal degree of consanguinity to him, his lands descend to such persons as tenants in common in equal parts, however remote from the intestate the common degree of consanguinity may be, unless the inheritance came to the intestate from his ancestors, in which case those not of the blood of such ancestors are excluded, if there be any person in being of the blood of such ancestor capable of inheriting.

The widow is entitled to one-third of the real estate (*her dower*) for life, and one-third of the personal estate absolutely, if there be children; if there be none, then to one-half. The residue is distributed to the children and their representatives, representation among collaterals being admitted as far only as nephews and nieces; and in default of children, to the next of kindred of the intestate who are in equal degree, and those who represent them.

If after the death of the father, any of the children (of whatever age) shall die intestate without wife or children in the life of the mother, every brother and sister shall have an equal share with her.

In default of heirs, the real and personal estate of an intestate goes to the overseers of the poor of the township in which he died, for the use of the poor of such township.

In Pennsylvania, if the intestate leave children only, they take *his real estate* equally as tenants in common; if children and the issue of children, such issue represent their parents, and take equally among them what their parents would have taken if living: if the intestate leave grandchildren only, they take equally as tenants in common; if grandchildren and the issue of grandchildren, such issue represent their parents, and so as to lineal descendants to the remotest degree.

and took bonds of the administrator for that purpose ; but such bonds were prohibited in the temporal courts, and declared to

If there be no issue, but only brothers or sisters, or both, they take equally ; and if any be dead, their issue represent them.

If there be father or mother, and brothers or sisters, the father takes all during his life ; if no father, the mother all during her life ; and after his or her death, the brothers and sisters, and the issue of deceased brothers or sisters take as they would have done if the father or mother had not survived the intestate.

If there be no brothers, nor sisters, nor their representatives, the father, if living, takes the whole in fee ; if he be dead, and the mother living, she takes the whole in fee ; but if the estate came on the part of the father, the mother cannot inherit, and so *vice versa*.

If there be no lineal descendants, nor father, mother, sisters nor brothers of the whole blood, nor their issue, then brothers and sisters of the *half-blood* and their issue take in preference to more remote kindred of the whole blood, unless the estate came to the intestate by descent, devise, or gift of some of his ancestors ; when all not of the blood of the ancestor are excluded.

In default of brothers and sisters of the half-blood, and their issue, the inheritance descends to and is divided among the next of kin of equal degree of the intestate, and if any such kindred be dead, their issue represent them.

Posthumous children inherit as if born in the life of the father.

If there be a *widow*, she takes, if there be lineal descendants, one-third ; if no lineal descendants, one-half of the estate during *life* ; not as dower at common law, but under the statute of distribution, and in lien and satisfaction of dower.

In all cases of descent not particularly provided for by statute, the common law still governs.

Of personal estate, the widow takes one-third, if there be lineal descendants ; one-half if there be not : the residue is distributed in like manner as real estate, except that, in the case where the father or mother would take only an estate for life in the real property, they take the personal absolutely ; and brothers and sisters of the half-blood take equally with the whole blood.

In Delaware, the real estate of an intestate is distributed equally among the children, or such as legally represent them ; children advanced bringing their advancement into the general distribution, under the penalty of exclusion : one-third to the widow during her life, and of the personal estate one-third absolutely.

If there be no children, nor legal representatives, one-half to the widow for life, and of the personal estate one-half absolutely ; the residue to the brothers and sisters of the intestate in fee, to whom also the remainder, after the death of the widow, descends.

If there be no brothers nor sisters, nor their representatives, then to the next

be void in point of law, on the ground, that by the grant of administration the ecclesiastical authority was executed, and

of kin in equal degree, or their representatives; but representation is not admitted among collaterals beyond brothers' and sisters' grandchildren.

If a man die intestate, leaving children by different *ventres*, or a woman leaving children by different fathers, and any of such children shall afterwards die intestate, the real estate of such child, so dying, which came from the common parent, is distributed, one moiety to the widow, if any, during her natural life, and the residue equally among the brothers and sisters of the deceased, or their legal representatives both of the whole and the half-blood, being issue of the same parent from whom the estate came; and in case there be none such, then amongst all the other brothers and sisters or their legal representatives; and in case there be none such, then the residue shall go equally to the next of kin in equal degree, and their representatives.

Real estate acquired in any other manner by an intestate, leaving no children, &c. is distributed, one moiety to the widow during life, the residue among the brothers and sisters of the whole blood, or their legal representatives; if there be none such, then to the brothers and sisters of the half-blood, &c. and if none, then to kindred in equal degree to the intestate, and their representatives.

If one die intestate without known kindred, his personal estate goes absolutely to the wife, and his real estate during life. If he leave no kindred nor wife, then the whole escheats to the commonwealth.

Posthumous children inherit as if born before the death of the father.

Personal estate is distributed as the real, except as it regards the half-blood, who take equally with the whole.

I. In Maryland, if the estate of an intestate in fee simple or fee tail general, come to him on the part of the father, it descends to the children of the intestate and their descendants equally; if no child or descendant, then to the father;* if no father, then to the brothers and sisters of the blood of the father, and their descendants; if no brother nor sister, nor descendant of them, then to the grandfather; and in default of him, to his descendants in equal degree, equally, and so passing to the next lineal *male* paternal ancestor; and if none such, to his descendants in equal degree, equally, without end.

If there be no paternal ancestor, nor descendant from such ancestor, then to the mother of the intestate; if no mother, then to her descendants in equal degree, equally; if no mother, and no descendants from her, then to the maternal ancestors and their descendants, in the same manner as to the paternal ancestors and their descendants.

II. If the estate descended on the part of the mother, it is subjected to the same rules as when it descended on the part of the father, *mutatis mutandis*, the paternal line being excluded until the maternal line is exhausted.

* This appears to be a strange inconsistency; unless "on the part of the father," means "by," "from," or "through" him. 7 *Cranch*, 456.

ought to interpose no farther^(b). Thus the grantee was entitled not only to administer, but also exclusively to enjoy the

(^b) 2 Bl. Com. 515. Edwards v. Freeman, 2 P. Wms. 441. Hughes v. Hughes, 1 Lev. 233. S. C. Cart. 125.

III. If the estate be vested in the intestate, in any other manner than above-mentioned, and he leave no issue, it descends to his brothers and sisters of the whole blood, and their descendants in equal degree, equally: if no brother nor sister, nor their descendants of the whole blood, then to the brothers and sisters of the half-blood, and their descendants in equal degree, equally. In default of these, to the father; if no father, then to the mother; if no mother, then to the grandfather on the part of the father, if no such grandfather living, then to his descendants in equal degree, equally.

If no such grandfather, nor descendant from him, then to the grandfather on the part of the mother; if no such grandfather, then to his descendants in equal degree, equally, and so on without end, alternating the next *male* paternal ancestor and his descendants, and the next *male* maternal ancestor and his descendants, and giving preference to the paternal ancestor and his descendants.

IV. In default of issue and kindred, the estate goes to the husband or wife, as the case may be: if the husband or wife be dead, then to his or her kindred in the like course, as if such husband or wife had survived the intestate, and then had died, entitled to the estate *by purchase*.

If the intestate has had more husbands or wives than one, and all shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands or wives, in equal degree.

Any issue of the intestate, born after the intestate's death, may inherit as if born before the intestate's death. No representation is admitted among collaterals, after brothers' and sisters' children.

If there be children, the *personal* estate is distributed, one-third to the widow, and the residue to the children; if there be no children, but a father or mother, brother or sister, or the child of a brother or sister, the widow takes one-half, and the father the other; if there be no father, to the mother, in equal shares with the brothers and sisters, and their representatives; if there be no mother, then to the brothers and sisters of the whole and half-blood, and their representatives, *per stirpes*, indiscriminately; if no brothers nor sisters, then to the next of kin in equal degree; no representation being admitted among collaterals, other than brothers and sisters, and no distinction made between the *whole* and *half*-blood. If there be no collaterals entitled, a grandfather may take; if there be two grandfathers, they take alike; and a grandmother, in case of the death of her husband, (the grandfather,) shall take as he might have done. Posthumous children take as if born before the intestate's decease. But no posthumous relation is considered as entitled to distribution in his own right.

Antinuptial children are legitimated by the marriage of the parents, and acknowledgment of the father.

residue of the intestate's effects (c). For the purpose, therefore, of aiding the imperfect jurisdiction of the ordinary, and of pre-

(c) *Edwards v. Freeman*, 2 P. Wms. 448.

In Virginia and Kentucky, the real estate of an intestate descends to his children, and their descendants, equally; if no children, nor their descendants, to the father; if no father, then to the mother, brothers, and sisters, and the representatives of brothers and sisters; but if an infant die without issue, his real estate, coming from the father, shall not go to the mother, if there be living any brother or sister of such infant, or brother or sister of the father, or lineal descendant of either of them.

And, *vice versa*, where an infant dies, leaving real estate which came on the part of the mother.

If there be no mother, nor brother nor sister, nor their descendants, then the inheritance shall be divided into two moieties, one of which shall go to the paternal, and the other to the maternal kindred, in the following course:—
1. to the grandfather; 2. if there be no grandfather, then to the grandmother, uncles and aunts on the same side, and to their descendants; 3. in default of these, then to the greatgrandfathers, or greatgrandfather if there be but one; 4. in default of these, then to the greatgrandmothers, or greatgrandmother if there be but one, and the brothers and sisters of the grandfathers and grandmothers, and their descendants; thus, without end, passing to the nearest lineal male ancestors, and for want of them to the nearest female ancestors in the same degree, and to their descendants; and if there be no such kindred on the one part, *the whole* shall go to the other part.

If there be no kindred on the one part nor on the other, the whole shall go to the wife or husband; and if the wife or husband be dead, it shall go to his or her kindred, in like course as if such wife or husband had survived the intestate, and had died entitled to the estate.

In cases where the inheritance is directed to pass to the ascending and collateral kindred of the intestate, if part of such collaterals be of the whole blood to the intestate, and the other part of the half-blood only, those of the half-blood shall inherit only half so much as those of the whole blood; but if all be of the half-blood, they shall have whole portions, only giving to the ascendants double portions.

Where the children of the intestate, or his mother, brothers or sisters, or his grandmother, uncles or aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female, in the same degree, come into partition; they shall take *per capita*; and where a part of them being dead, and a part of them living, the issue of those dead have a right to partition; such issue shall take *per stirpes*.

But no right shall accrue to any person whatsoever, (other than the children of the intestate,) unless they are in being, and capable in law to take as heirs, at the time of the intestate's death.

venting any single hand from sweeping away the whole surplus (^d), the stat. 22 & 23 Car. 2. c. 10. commonly called the

(^d) *Petit v. Smith*, 1 P. Wms. 8. *Bowers v. Littlewood*, 594. *Carter v. Crawley*, Raym. 496. 4 Burn. Eccl. L. 342, 343.

Children, having received from the intestate an advancement in real estate, must bring it into *hotchpot*.

In making title by descent, it shall be no bar to the defendant, that any ancestor, through whom he derives his descent, is or has been an alien.

Bastards inherit from the mother, as if lawfully begotten; and antinuptial children, if recognised by the father, and legitimised; and the issue also of a marriage null in law are deemed legitimate.

The surplusage of the personal estate is distributed, if there be no child, one-half to the widow; if there be children, one-third. But she takes no more than the use for life of such *slaves* as shall be in her share.

The residue, together with the slaves, after the wife's death, or, if there be no widow, the whole of the surplus, is to be distributed in the same proportions and to the same persons as lands are directed to be distributed to. Children advanced in personal estate must bring it into *hotchpot*.

Cases not provided for by the Act of Descents, are regulated by the common law.

In North Carolina, the real estate of the intestate descends to his issue in equal degree, equally, and to the representatives of such issue.

On failure of lineal descendants, if the estate has come on the part of an ancestor to whom the intestate would have been one of the heirs, the inheritance shall descend to the next collateral relations in equal degree of the blood of such ancestor, equally.

If the estate have not come on the part of an ancestor, or if, being so transmitted, the blood of such ancestor is extinct, it shall descend to the next collateral relations of the persons last seised, whether of the paternal or maternal line, in equal degree, equally, the collaterals of the half-blood taking equally with those of the whole; the degrees of relationship to be ascertained by the rules of the common law.

If the intestate leave no issue, nor brother nor sister, nor the issue of such, the inheritance vests *for life only* in the parents of the intestate, or in the surviving one, if one be dead; and on the death of one of the parents, in the survivor, and afterwards is transmitted according to the preceding rules.

If any of the children have been advanced by settlement upon them of lands in fee simple by the parent, such advancement must be brought into *hotchpot*.

Illegitimate children, if there be none legitimate, take the real and personal estate of the mother, as if born in wedlock: and if such illegitimate child die intestate, and without issue, his estate real and personal passes to his brothers and sisters born of the same mother, and to their representatives, in like manner as if they were born in lawful wedlock.

statute of distributions (^e), was enacted. That statute, after empowering the ordinary, on the granting of administration,

(^e) Made perpetual by 1 Jac. 2. c. 17. s. 5 Vid. Rex v. Raines, 1 Ld. Raym. 574.

With regard to *personal* estate, the provisions of the stat. 22 & 23 Car 2. c. 10, and the stat. 1 Jac. 2. c. 17, are in force, except that if there be no children, or not more than two, the widow takes a third; if there be more than two, she takes a child's portion.

In South Carolina, if there be children, or issue of them, and a widow, she takes one-third of the estate real and personal, and the remainder is divided equally among the children, and their representatives. Lineal descendants represent their respective parents, and divide equally among them the share such parents would have been respectively entitled to, had they survived the ancestor.

If there be no issue, but a widow and a father, or mother, the widow is entitled to a moiety, and the father, or if he be dead the mother, to the other moiety. If the father and mother be dead, and there be brothers and sisters, or brother or sister of the whole blood, or issue of them, the widow takes one moiety, and the brothers and sisters, &c. the other moiety, as tenants in common. The children of a deceased brother or sister take respectively the share which their respective ancestors would have been entitled to, had they survived the intestate.

If there be no lineal descendants, father or mother, or brother or sister, of the whole blood, but a widow and a brother or sister of the half-blood, and a child or children of a brother or sister of the whole blood, the widow takes a moiety of the estate, and the other moiety is divided equally among the brothers and sisters or brother or sister of the half-blood, and the child or children of brothers and sisters of the whole blood; the children of every deceased brother or sister of the whole blood taking among them a share equal to the share of the brother or sister of the half-blood: but if there be no brother nor sister of the half-blood, then a moiety to the child or children of deceased brother or sister; and if there be no child of a deceased brother or sister, then the said moiety descends to the brothers and sisters of the half-blood.

If there be no lineal descendant, father, mother, brother or sister of the whole blood, or their children, or brother or sister of the half-blood, the widow takes one moiety, and the lineal ancestor or ancestors the other moiety.

In default of lineal ancestors, the widow takes two-thirds of the estate, and the remainder descends to the next of kin.

If there be no widow nor lineal descendant, but a father or mother, and brothers or sisters, (one or more,) the estate real or personal descends to the father (if he be dead, to the mother) and to the brothers and sisters living at the death of the intestate, equally to be divided among them. But the issue of any deceased brother or sister takes the share the parent would have taken if living, equally among them if more than one, and if only one, the whole to that one.

to take a bond of the administrator, with two or more sureties, conditioned as I have already stated, farther authorizes him to

If there be no widow, her share passes as the rest of the estate is directed to be distributed, in the several cases in which the widow is provided for.

On the death of any married woman, the husband takes the same share of her real estate as is given to the widow out of the real estate of the husband; and the remainder is distributed among her descendants and relations, in the same manner as is directed in the case of the intestacy of a married woman.

If she leave no husband, her estate is distributed as that of a man intestate, leaving no wife.

The personal estate is distributed as the real.—Children advanced, must bring their advancement into *hotchpot*. And, it would *seem*, that the husband may elect his courtesy, and the wife her dower, but they cannot take such estates and a distributive share of the realty.—Degrees of kindred are computed according to the civil law.

In Georgia, if there be a widow and children, they take *equal* shares, unless the widow elects her dower; in which case, she has nothing further of the real estate, but takes a child's part of the personality. If any of the children die before the intestate, their lineal descendants stand in their place.

If there be no children, or representatives of them, the widow takes a moiety, and the other moiety goes to the next of kin of the intestate in equal degree, and their representatives, equally.

If no widow, the whole goes to the children and their representatives.

In default of these, to be distributed to the next of kin of the intestate, and their representatives in equal degree; but no representation among collaterals is admitted beyond nephews and nieces.

If there be a father or mother, such father (or mother in case the father be dead) inherits and takes in distribution as a brother or sister would do. But if the mother have intermarried, the share otherwise allotted to her passes to the next of kin on the father's side: and in case of the death of the last child intestate and without issue, the mother takes no part of such child's estate, but it passes to the next of kin on the father's side.

If a person die intestate and without issue, having brothers and sisters of the whole blood and the half-blood, then the brothers and sisters of the whole blood and the half-blood in the paternal line only inherit equally; but if there be no brother nor sister, nor issue of brother or sister of the whole blood or half-blood in the paternal line, then those of the half-blood and their issue in the maternal line may inherit.

The next of kin are investigated by the following rules; children shall be nearest parents; brothers and sis'ers shall be equal in respect to distributions, and cousins shall be next to them; the half blood shall be admitted to a distributive share of the real and personal estate, in common with the full blood. *Sed vide the clause next above.*

proceed, and call such administrator to account touching the goods of the intestate; and on hearing, and on due considera-

The whole estate, real and personal, is vested by marriage absolutely in the husband, and in case he dies intestate, passes to his representatives.

No distinction is made in the distribution of real and personal estate, unless in the case of a widow electing dower.

In Alabama and Mississippi, the lands, &c. of the intestate are distributed to the children and their descendants in equal parts, the issue of deceased child or grandchild take the share of the deceased parent, in equal parts among them: if there be no children nor their descendants, then to the brothers and sisters of the intestate and their descendants, in equal parts, the descendants of a brother or sister taking in equal parts among them the deceased parent's share. In default of these, then to the father, if he be living, if not, to the mother of the intestate. In default of all the foregoing relations, then to the next of kin in equal degree, computing by the civil law: no representation being admitted among collaterals, further than nephews and nieces of the intestate, and no distinction being made between kindred of the whole and half-blood, except that the kindred of the whole blood in equal degree are preferred to the kindred of the half-blood in the same degree. The widow's right of dower is preserved in all cases, and where there is no issue of the intestate, she takes as her *dower* one half of the estate of her deceased husband.

The personal estate is distributed as real.

Antinuptial children are legitimated by marriage of the parents.

In Louisiana, legitimate children inherit equally, and the issue of such as are dead take *per stirpes*: if there be no children or lineal descendants, the estate passes to the father and mother, or other ascendants of the deceased, and is divided, if there be paternal and maternal descendants in the same degree, into two equal shares, one to the paternal, and the other to the maternal side. If there is only one ascendant, either paternal or maternal, in the same degree in both lines, such ascendant excludes all other ascendants of a more remote degree; no representation being admitted in the ascending line.

Collaterals inherit when the intestate has left neither descendants nor ascendants; those of the nearest degree of the whole blood having preference.

Where there are brothers or sisters of the whole blood, the inheritance is by roots; but the right of representation does not extend to the grandchildren of other brothers or sisters, in competition with brothers and sisters of the deceased. These principles apply to inheritance by brothers and sisters of the half-blood; and grandchildren of collaterals of the whole blood do not exclude collaterals of the half-blood.

If there be no brothers nor sisters of the whole blood, but there be both paternal and maternal brothers or sisters, these and their children, by representation, prevail over all other collateral kindred.

But the paternal and maternal collaterals, and their children, inherit, *particularly*, that part of the property which has been acquired on the part of the

tion thereof, to make equal and just distribution of what remains clear after all debts, funeral, and just expenses of every

father and mother, respectively, of the deceased, and hold in common such part as was acquired by art or industry, constituting what is termed the acquests and gains; that is, property acquired by husband and wife, by mutual industry, not falling by inheritance, nor acquired by donation.

Among other collaterals, those of the nearest degree exclude all others, and those of equal degree partake equally.

If the intestate leave neither lawful descendants nor ascendants, nor collateral relations, 1. The surviving *husband* or *wife*, or, 2. Their natural children, or 3. The State, acquire the succession in the order here mentioned.

Natural children succeed to their mother, being duly acknowledged by her, and she having left no lawful descendants, to the exclusion of her father and mother, and other ascendants or collaterals of lawful kindred, and of her husband; if the mother have legitimate issue, her natural children have only a moderate alimony, and this alimony, though it should have been made *inter vivos*, or *mortis causa*, cannot exceed one fifth of her property.

Natural children are called to the inheritance of their father, being duly acknowledged by him, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife.

Antinuptial children, acknowledged by the parents, either before marriage or by the contract of marriage, are legitimated: and legitimation may be extended to deceased children, leaving issue, in which case it benefits such issue.

The estate of a natural child, dying intestate and without issue, goes to the father or mother who has acknowledged him, or by halves to the father and mother when both have acknowledged him. If the father and mother be dead, his estate passes to his natural brothers or sisters, or to their descendants.

If a husband, having no lawful descendants, ascendants, nor collateral relations, leaves a wife not separated *à mensa & thoro*, the wife takes his estate, to the exclusion of natural children duly acknowledged.

The degrees of consanguinity are determined by the civil law.

The distribution of the real and personal estate is subject, generally, to the same rules.

But to understand the distribution of estates, a few remarks are necessary, upon the relations in regard to property produced by marriage.

By marriage, a *partnership*, or community of gains, is established. This consists of the profits of all the effects, of which the husband has the administration and enjoyment; of the produce of the mutual labour and industry of husband and wife; and of the estates they may acquire, during marriage, by donation or by purchase, or in any other similar way.

On the dissolution of the marriage, all property possessed by husband and wife is presumed by law to appertain to the partnership, and it lies on the party having the interest to show separate title.

The property of the community may be disposed of by the husband in any

sort first allowed and deducted, among the wife and children, or children's children, if any such be, or otherwise to the next

manner during his life, the wife or her heir acquiring no interest in it until his death: but, on the dissolution of the marriage, it is divided equally between the husband and wife, or their heirs. This estate is liable to the debts of the partnership; but the wife may discharge herself from liability, by renouncing the community.

The property of the wife is *dotal* or *paraphernal*.

By *dotal*, is meant the effects which the wife brings to the husband to support the expenses of marriage, and which are settled on her by marriage. The husband has the administration of the dowry; but the wife has a tacit mortgage on all his estate, into whatever hands it may pass, for a restitution of it

By *paraphernal* property, is meant all the effects of the wife, which have not been settled on her as dowry.

In the distribution of estates, therefore, the proper or hereditary effects of the husband, and one-half the property of the community, are allotted to the husband, or his heirs; the other half of the partnership property, together with the dowry and paraphernal estate, to the wife or her heirs.

In Missouri, the real and personal estate goes to the children or their descendants; if none, to the father, mother, brothers and sisters, and their descendants, or such of them as there be, in equal parts.

In default of these, then grandfather, grandmother, uncles and aunts, and their descendants, or such of them as there be, in equal parts.

In default of these, then to greatgrandfathers, greatgrandmothers, their brothers and sisters, and their descendants, or such of them as there be, in equal parts; and so passing to the nearest lineal ancestors, and their children, and their descendants, or such of them as there be, in equal parts.

In default of all these, then the whole goes to the wife or husband of the intestate; and "if the wife or husband be dead, then to his or her kindred, in like course as if such husband or wife had survived the intestate, and then died entitled to the estate."

Posthumous children inherit as if born in the lifetime of the intestate; but no right of inheritance accrues to any person whatever, other than the children of the intestate, unless in being, and capable to take in law as heir, at the time of the intestate's death.

In cases where the inheritance passes to the ascending and collateral kinsmen of the intestate, if part of such collaterals be of the whole blood, and part of the half-blood only, those of the half-blood inherit only half as much as those of the whole blood; but if all the collaterals be of the half-blood, they shall have whole portions, only giving to the ascendants, if any there be, double portions.

Where several lineal descendants, and all of equal degree of consanguinity to the intestate, however remote, or his or her father, mother, brothers or sisters, or his or her grandfather, grandmother, uncles and aunts, or any ancestor

of kindred to the deceased, in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws

living, and their children, come into partition, they shall take *per capita*; and the issue of such as are dead, having right to partition, shall take *per stirpes*.

Children advanced, by gift of real or personal estate, must bring their advancement into *hotchpot*.

In making title by descent, it is no bar to the demandant, that he claims as an alien.

Bastards may inherit, and transmit inheritance, on the part of the mother. Antinuptial children are legitimated by marriage; and the issue of all marriages deemed null in law, or annulled by divorce, are also legitimated.

The widow in all cases is entitled to *dower* in the real and personal estate.

In Tennessee, the estate of the intestate descends to the children equally, and their descendants; such descendants taking their parents' share equally among them.

If there be no issue, then to the brothers and sisters of the intestate, equally, as tenants in common, and to their descendants: and if any such brother or sister die before the intestate, leaving children, they take the share of the deceased parent, equally, as tenants in common. And the same rule of descent is to apply, where *collateral* descendants shall be further removed than the children of brothers and sisters.

If the estate *descends* from an ancestor, the half blood cannot take until the blood of such ancestor be exhausted; if it come by *purchase*, the half-blood inherit as the whole.

Where the intestate leaves no children, nor their issue, nor brother nor sister, nor their issue, the estate vests in fee simple in the parent from whom it was derived. If the estate have been acquired otherwise than by descent, it shall vest in the father in fee; if he be dead, then in the mother for life; after the death of the mother, then in the heirs of the intestate on the part of the father, and if none such, then on the part of the mother, for ever.

Cases not embraced by the statute are governed by the common law.

Bastards, in case there are no legitimate children, inherit from the mother, as if legitimately begotten; and in case of death of such bastard without issue, his brothers or sisters take his estate.

Bastards may be legitimated, for the purpose of inheriting, on petition of the parent to the superior or county Court.

Aliens are excluded from the inheritance, generally; but special provisions have been made, from time to time, for relief of aliens related to intestates.

The personal estate is distributed, if there be no children, or not more than two children, one third part to the widow; if more than two children, she takes a child's part: the residue, or, if there be no widow, the whole, to the children, or their representatives; such representatives taking *per stirpes*. If there be no legal representatives, then to the next of kin in equal degree, and their representatives. No representation is admitted among collaterals, after bro-

in such cases, and the rules and limitation thereafter set down; and the same distributions to decree and settle, and to compel

thers' and sisters' children. If there be only nephews and nieces of the intestate, and their issue, they will take, not by representation of their uncles and aunts, but as next of kin to the intestate.

If any of the children be advanced by the intestate, such advancement must be brought into *hotchpot*.

The widow is entitled to dower.

In Illinois, the estates real and personal of resident and non-resident proprietors are distributed among the children, and descendants of a deceased child, *in equal parts*. The descendants of a deceased child, or grandchild, take the share of their deceased parent, *in equal parts among them*.

Where there is no issue, then in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister take in equal parts among them their deceased parent's share. There is in no case a distinction between the kindred of the whole and of the half-blood.

The widow is entitled to one-third of the real estate for life, and one-third of the personal estate absolutely.

In Indiana, real estate, on intestacy, descends to the children, equally; if no children, nor descendants, to the father; if no father, to the mother, brothers and sisters, in equal parts; if no father, mother, brothers, nor sisters, the estate is divided into moieties, one-half going to the paternal, and the other to the maternal kindred.

But the widow of an intestate, having no issue, and no father, mother, brothers nor sisters, is entitled to all his personal, and half his real estate; and, for want of paternal or maternal kindred, the whole estate goes to the wife.

If there be no wife, the estate is to be applied to the support of free schools in the county in which such property is situated.

In dividing the estate among heirs, all property received by any of them previously, by way of advancement, shall be taken into view, if such person claim a right of inheritance.

Illegitimate children inherit from the mother, as though they were legitimate.

Antinuptial children are legitimated by marriage of the parents.

The right of the half-blood depends on the common law.

The personal estate is distributed among the children equally, and their representatives; if no children, nor representatives of children, one moiety to the wife, and the remainder to the next of kin in equal degree, and to their representatives. No representatives are admitted among collaterals, after brothers' and sisters' children.

The wife is entitled to dower.

In Ohio, if the real estate come to the intestate by descent, devise, or gift, from an ancestor, it descends in parcenary, in the following manner: 1. to the children of the intestate, or their legal representatives; 2. to his brothers and

such administrator to observe and pay the same by the due course of the ecclesiastical laws. The statute then proceeds to prescribe the distribution of such surplusage in manner following; [371] that is to say, one third part thereof to the wife of the intestate, and all the residue by equal portions among his children, and such persons as legally represent such children, in case any of them be then dead, other than such child or children, not being heir at law, as shall have any estate by the settlement from the intestate, or shall be advanced by him in his lifetime by portion, equal to the share which shall by such distribution be allotted to the other children, to whom such distribution is to be made; and in case any child, other than the heir at law, who shall have any estate by settlement from the intestate, or shall be advanced by him in his lifetime by portion, not equal to the share which will be due to the other children by the distribution, then so much of the surplusage shall be distributed to such child as shall have any land by settlement from the intestate, or was advanced in the lifetime of the

sisters of the blood of the ancestor, whether of the whole or half-blood to the intestate; 3. to the ancestor, if living; 4. to the brothers and sisters of the ancestor, or their representatives; 5. to the brothers and sisters of the half-blood, not of the ancestor, or their representatives; 6. to the next of kin to the intestate, of the blood of the ancestor.

If the estate came to the intestate by *purchase*, it descends, 1. to his children, and their representatives; 2. to his brothers and sisters of the whole blood, and their representatives; 3. to the brothers and sisters of the half-blood, and their representatives; 4. to the father; 5. to the mother; 6. to the next of kin to, and of the blood of, the intestate.

One of the several heirs in the same degree being deceased, his representatives take his share; and if all the heirs are in the same degree, they take *per capita*; if not, *per stirpes*.

Inheritance may be derived through an alien, or a bastard, by way of the mother. Antinuptial children are legitimated by the marriage of the parents.

Of the personal estate, the widow is allowed a suitable proportion, at the discretion of the appraisers, for her support for one year.

If there be legitimate children, and the personal estate, after the above allowance, and payment of the debts, is over \$400, the widow has one-third as her own property; if under \$400, she has one-half: if there be no legitimate children, she takes all the remaining personal property as her own.

In other respects, distribution of personality is according to the law of descents of real estate.

intestate, as shall make the estate of all the children to be equal, as near as can be estimated ; but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land.

It then directs, that in case there be no children, nor any legal representatives of them, one moiety of the estate shall be allotted to the wife of the intestate, and the residue of the same shall be distributed equally among every of his next of kindred who are in equal degree, and those who legally represent them.

[372] It also provides, that no representations shall be admitted among collaterals after brothers' and sisters' children ; and in case there be no wife, then that all the estate shall be distributed equally among the children ; and in case there be no child, then among the next in kindred to the intestate, in equal degree, and their legal representatives as aforesaid, and in no other manner.

And it farther directs, for the benefit of creditors, that no such distribution of the goods of an intestate shall be made, till after the expiration of one year from his death ; and that every one to whom any distribution and share shall be allotted, shall give bond, with sufficient sureties, in the spiritual court, that if any debt, truly owing by the intestate, shall afterwards be sued for and recovered, or otherwise duly made to appear, that then, and in every such case he shall refund, and pay back to the administrator, his rateable part of that debt and of the costs of suit, and charges of the administrator by reason of such debt, out of the part and share so allotted to him, thereby to enable the administrator to pay and satisfy the debt so discovered after the distribution made.

The statute also contains a proviso, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do ; and the will of the deceased in such testament expressed, shall be performed and observed in such manner as before the passing of the act.

[373] It also expressly excepts and reserves the customs of the city of London, of the province of York, and of other places having peculiar customs of distributing an intestate's effects.

Doubts having arisen, whether the husband's right to administration to his wife was not superseded by force of this statute, and whether he was not thereby bound to distribute her personal estate among her next of kin (^f) ; by the stat. 29 Car. 2. c. 3. s. 25. it is provided, that the above act shall not extend to estates of feme coverts who die intestate, but that the husband may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as before. And although he die without having taken out letters of administration to his deceased wife, her next of kin, on taking out such administration, will be a trustee for the husband's personal representative ; for the operation of this clause in the statute of frauds is not confined to the life of the husband, nor to the circumstance of his having reduced any part of his wife's personal estate into possession, but provides that no part of her estate shall be distributable among her relations after her death (^g).

On the construction of the statute of distributions, a variety of points have been resolved.

After the allotment of the third to the widow, the statute, as we have seen, directs a distribution of the residue by equal portions among the intestate's children, and such persons as legally represent such children, in case any of them be dead, that is, their lineal descendants to the remotest degree (^h).

To attain a clear apprehension of the subject, three sorts of [374] cases may be supposed : First, where none of the intestate's children are dead. Secondly, where the intestate's children are all dead, all of them having left children. Thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children.

On the first hypothesis, that is to say, where none of the intestate's children are dead ; it is sufficiently obvious, that after the wife has had her third allotted to her, the remaining two-thirds shall, pursuant to the statute, be equally divided among all the children of the intestate, as in this case they all claim

(^f) *Vid. supr. 85.*

(^g) *Squib v. Wyn*, 1 P. Wms. 381.

(^h) *Vid. 4 Burn. Eccl. L. 358. Com.*

Dig. Admon. H. Carter v. Crawley, Raym. 500. Pett's Case, 1 P. Wms. 27.

in their own right. A brother or sister of the half-blood shall be equally entitled to a share with one of the whole blood, inasmuch as they are both equally near of kin to the intestate (ⁱ). Nor shall their being posthumous in either case make any difference (^k). For a child *en ventre sa mère* at the time of the father's death, being a person *in rerum natura*, is by the rules of the common and civil law, to all intents and purposes, a child, as much as if born in the father's lifetime, and, consequently, is entitled under the statute (^l). If the intestate leave only one child, such case is not to be considered as omitted by the statute; therefore, in case he also leave a wife, she shall have only a third part, and the other two-thirds shall go to such child (^m). So, where there is only one to claim under the statute, and therefore, literally and strictly speaking, there can be no distribution, yet such individual shall be entitled to the property (ⁿ).

[375] In regard to the second supposition, if A have three children, B, C, and D, and they all die, B leaving, for instance, two children, C three, and D four, and A afterwards die intestate; in that case all his grand-children shall have an equal share; for as his children are all dead, their children shall take as next of kin. Such also would be the case with respect to the great grand-children of the intestate, if both his children and grand-children had all died before him (^o).

In all the above instances, the parties are said to take *per capita*, or, in other words, equal shares in their own right (^p).

(ⁱ) 3 Bac. Abr. 74. Com. Dig. Admon. H. Smith *v.* Tracy, 1 Mod. 209. S. C. 2 Mod. 204. 2 Jones, 93. S. C. 1 Ventr. 316. S. C. 2 Lev. 173. Show. Parl. Ca. 108. Earl of Winchelsea *v.* Norcliffe, 1 Vern. 437. Crooke *v.* Watt, 2 Vern. 124. Brown *v.* Farnell, Carth. 51.

(^k) Burnet *v.* Man, 1 Ves. 156. 4 Burn. Eccl. L. 344. Ball *v.* Smith, 2 Freem. 230. Edwards *v.* Freeman, 2 P. Wms. 446.

(^l) Wallis *v.* Hodgson, 2 Atk. 117. See also Thellusson *v.* Woodford, 11 Ves. jun. 139.

(^m) 3 Bac. Abr. 75. Brown *v.* Farnell, Carth. 52. Skin. 212. pl. 5. 219. pl. 3.

(ⁿ) 4 Burn. Eccl. L. 343. 3 P. Wms. 49, note (^d). Palmer *v.* Garrard, Prec. in Ch. 21.

(^o) 3 Bac. Abr. 75. 1 Eq. Ca. Abr. 249. pl. 7. Walsh *v.* Walsh, Prec. Chan. 54. Bowers *v.* Littlewood, 1 P. Wms. 595. Davers *v.* Dewes, 3 P. Wms. 50. Lloyd *v.* Tench, 2 Vez. 213. Durant *v.* Prestwood, 1 Atk. 454. Janson *v.* Bury, Bumb. 159. 2 Bl. Com. 517.

(^p) 2 Bl. Com. 218. 517.

Thirdly, in the event of some of the intestate's children being living, and some dead, and such as are dead having each left children; the grand-children take *per stirpes*, that is to say, not in their own right, but by representation^(q). Thus, for example, if A have three sons, B, C, and D, and B die, leaving four children, and C die, leaving two: on A's dying intestate, one third shall be allotted to D, one third to B's four children, and the remaining third to C's two children; for these grandchildren are entitled as representing their respective parents^(r).

After directing the residue to be divided among the children, [376] or their representatives, as above stated, the statute provides, that no child of the intestate, except his heir at law, on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall participate with them of the surplus; but if the estate so given him by way of advancement be not equivalent to their shares, then that such part of the surplus as will make it so, shall be allotted to him.

The statute does not divest the child of any property which has thus been given to him, however unequal it may have been, or how much soever it may exceed the residue: he may, if he pleases, keep it all: if he be not contented, but would have more, then he must bring what he has before received, as the law expresses it, into hotchpot, that is, into the general mass of the property to be so divided.

This is the clear intention of the act, grounded on that principle of equality^(s), to which a court of equity is ever inclined.

Therefore, before a younger child has any claim to a share of the distribution, he must first bring his advancement into hotchpot.

The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually

(q) 2 Bl. Com. 217.

(s) Edwards v. Freeman, 2 P. Wms.

(r) 3 Bac. Abr. 75. 1 Eq. Ca. Abr. 249.

443. 449 4 Burn. Eccl. L. 344. 2 Bl.

Walsh v. Walsh, Prec. Chan. 54. 2

Com. 190. 517.

Bl. Com. 517.

given to them. Therefore a child advanced by her father in his life, cannot be called on to bring her share into hotchpot (^c).

What shall constitute such advancement, is now to be discussed.

If a father purchase for a son an advowson, or any other [377] ecclesiastical benefice, or, if he buy him any office, civil or military, these are held to be such advancements, either partial or complete, according to the comparative value of the estate to be distributed (^u). And although the office be only at will, as a gentleman pensioner's place, or a commission in the army, it is regarded in the same light (^w).

A provision made for a child by a settlement, either voluntary, or for a good consideration, as that of marriage, is an advancement *pro tanto* (^x).

Nor does the statute extend only to land itself (^y), when settled on a younger child by the father, but also to a charge on the land, created by him for the benefit of such child; therefore, if a father settle a rent out of his lands on a younger child, this also is such an advancement as is intended by the statute (^z). Nor is it necessary that the provision should take place in the father's lifetime (^a). If by deed he settle an annuity, to commence after his death, on such child, it is of the same description (^b). So a reversion settled on a child, as it is capable of being valued, is of the same nature (^c). A portion secured to a child, although *in futuro*, is also an advancement (^d). And [378] were it only contingent, yet when the contingency has happened, it shall be thus considered (^e).

A portion for a daughter, to be raised out of land, on her attaining the age of eighteen, or the day of her marriage, was accordingly held to be an advancement to her when she married,

(^c) *Per Mas. of the Rolls, Walton v. Walton*, 14 Ves. jun. 324.

(^z) *Edwards v. Freeman*, 2 P. Wms. 441.

(^u) 3 P. Wms. 317. note (^o). Sed vid. *Swinb.* p. 3. s. 18.

(^a) *Ibid.* 2 P. Wms. 440. 445.

(^w) 3 P. Wms. 317. note (^o).

(^b) *Ibid.* 2 P. Wms. 442. *Swinb.* p. 3. s. 4.

(^x) *Edwards v. Freeman*, 2 P. Wms. 440. 444. *Phiney v. Phiney*, 2 Vern. 638.

(^c) *Ibid.* 2 P. Wms. 442.

(^y) 11 Vin. Abr. 192. 2 P. Wms. 441.

(^d) *Edwards v. Freeman*, 2 P. Wms. 445.

(^e) *Ibid.* 2 P. Wms. 442. 446. 449.

although she were under that age, and unmarried, at the time of the intestate's death (^f).

A portion, also, while contingent, is capable of a valuation, and may, it seems, be brought into hotchpot (^g); or the court may order, that, in case the contingency should happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was settled (^h). But the contingency must be so limited as necessarily to arise within a reasonable time, as in the above case, where the portion was secured for the daughter, on her attaining the age of eighteen, or on her marriage (ⁱ). A child advanced in part shall bring in his advancement only among the other children; for no benefit shall accrue from it to the widow (^k). If a child who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancement; since, as his representatives, they can have no better claim than he would have had if living (^l).

By this statute, although the heir at law shall not abate in respect of the land which came to him by descent, or otherwise, from the intestate; yet if he hath had an advancement from his father in his lifetime out of the personal estate, he shall abate for it in the same manner as the other children (^m). And, were it merely the use of furniture for his life, it shall be regarded as an advancement *pro tanto* (ⁿ). So, where A on his marriage covenanted, in case of a second marriage, to pay his eldest son by his first wife five hundred pounds; she died, leaving a son, and other children, and A after a second marriage died intestate; it was decreed, that his heir should bring in the money, although he were in the nature of a purchaser, under a marriage settlement (^o).

Co-heiresses shall also, it seems, bring in such advancement,

(^f) 2 P. Wms. 435. 1 Eq. Ca. Abr. 249. pl. 10. 2 Eq. Ca. Abr. 446. pl. 3.

(^g) Per Sir Jos. Jekyl, M. R. arguendo. 2 P. Wms. 442.

(^h) Per Ld. Raymond, C. J. arguendo, 2 P. Wms. 446.

(ⁱ) 2 P. Wms. 440. 445. 449.

(^k) 3 Bac. Abr. 77. Ward v. Lant, Prec. Chan. 182. 184.

(^l) Proud v. Turner, 2 P. Wms. 560.

(^m) Com. Dig. Admon. H. 4 Burn. Eccl. L. 344. Fitzg. 285.

(ⁿ) Com. Dig. Admon. H. Fitzg. 285.

(^o) Phiney v. Phiney, 2 Vern. 638.

not being land, as they may have respectively received from their father, before they shall be entitled to their distributive shares, agreeably to the principle of the act, and to the object of a just and impartial father to promote an equality among his children (p).

[380] Such is the nature of the advancement which will exclude a child from any part of the residue. Many benefits, however, may be conferred upon him by his father, which have been held not to be of this description.

Small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to the child, as of a gold watch or wedding clothes, shall not be deemed an advancement (q); nor shall money expended by the father for his maintenance, nor given to bind him an apprentice, nor laid out in his education at school, at the university, or on his travels (r). Nor shall what a child receives out of the *mother's* estate be so regarded; for the statute of distributions was grounded on the custom of London, which never affected a widow's personal estate, and seems to include those only within the clause of hotchpot, who are capable of having a wife as well as children, which must be husbands (s). Nor shall a provision which a father may make for his child by will, (for a case may occur where a testator may die intestate as to part of his personal estate,) be considered in that light. Nor land given by the father's will to a younger child (t).

Such a provision as shall be construed an advancement, must result from a complete act of the intestate in his lifetime (u), by which he divested himself of all property in the subject, though, as we have just seen (w), it may not take effect in possession [381] till after his death. Still less shall property given or bequeathed to the child by any other person be so denominated (x); and least of all, shall a fortune of his own acquisition (y).

(p) 4 Burn. Eccl. L. 344. Edwards v. Freeman, 2 P. Wms. 440. 443.

(q) 3 P. Wms. 317, note (o). Elliot v. Collier, 1 Vez. 16. Garon v. Trippit, Ambl. 189. Elliot v. Collier, 3 Atk. 528.

(r) 3 Bac. Abr. 76. Swinb. p. 3. s. 18. Edwards v. Freeman, 2 P. Wms. 449.

(s) Holt v. Frederick, 2 P. Wms 356.

(t) Edwards v. Freeman, 2 P. Wms. 440. 446.

(u) 2 P. Wms. 440.

(w) Vid. supr. 377.

(x) 3 Bac. Abr. 76. Swinb. p. 3. s. 18.

(y) Swinb. p. 3. s. 18.

In respect to borough english lands, which descend to the youngest son, it has been held that he should allow for them, on the ground, that the statute intended merely to provide for the heir of the family, that is the heir by the common law, and not one who is heir only by custom in some particular places^(z). But that decision has been over-ruled, and it is now settled, that such youngest son shall have an equal share of the distribution with the other children, without regard to this species of estate: for although the exception in the statute extend only to the eldest son, yet no law exists to oblige the heir in borough english to bring in his lands. The statute contains no such requisition. It speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime^(a). [2]

Thus must the surplus be distributed, in case the intestate has left a wife and children, or representative of children.

The statute then provides, that if there be no children, nor [382] legal representatives of them, in existence, a moiety shall go to the widow, and a moiety to the next of kindred, in equal degree, and their representatives; but no representation among collaterals shall be admitted farther than brothers' and sisters' children. If there be no widow, the whole shall go to the children. If there be neither widow nor children, then the whole shall be distributed among the next of kin, in equal degree, and their representatives, as above-mentioned.

The next of kin referred to by the statute are to be traced by the same rules of consanguinity as those who are entitled to letters of administration^(b). Those rules have been already discussed^(c).

(z) Per Sir Jos. Jekyl, M. R. Stra. 935.

(b) 2 Bl. Com. 515. Lloyd *v.* Tench,

(a) Per Lord Talbot, C. Lutwyche *v.*

2 Vez. 214.

Lutwyche, Ca. Temp. Talb. 276. 4

(c) Vid. supr. 87.

Burn. Eccl. L. 345.

[2] In Vermont, any deed of lands or tenements, made for love and affection; or any personal estate delivered to a child, charged in writing, by the intestate or his order, or a memorandum made thereof, or delivered expressly for that purpose, before two witnesses who were requested to take notice thereof, shall be deemed an advancement.

The mother, therefore, as well as the father, succeeded to all the personal effects of the children who died intestate without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased; and such is the law still with respect to the father^(d); but by the stat. 1 Jac. 2. c. 17. s. 7, if, after the death of the father, and in the lifetime of the mother, any of the children die intestate, without wife or children, every brother and sister, and their representatives, shall have an equal share with her. The principle of which provision is this, that otherwise the mother might marry, and transfer all to another husband^(e).

[383] On this last-mentioned statute it has been held, that if A die intestate, and without issue, leaving a wife, and several brothers and sisters, and his mother living, the mother shall have no more than an equal share of a moiety of the estate with the brothers and sisters. And although there should be no brother or sister, yet if there be children of a deceased brother or sister, they shall partake with their grandmother to the same extent as their parent would have been entitled^(f). But if there be neither brother nor sister, nor representative of a brother or sister, the case is without the statute, and the whole of such intestate's effects shall devolve, as before, to his mother^(g). Also, by analogy to the statute of distributions, such representation shall not be carried beyond brothers' and sisters' children^(h). A mother-in-law of the intestate, it is clear, can claim no share in the distribution, she not being of his blood⁽ⁱ⁾.

To return now to the statute of distributions. That clause of it which expresses that there shall be no representations among collaterals beyond brothers' and sisters' children, must be construed to mean brothers and sisters of the intestate, and not as admitting representation, when the distribution happens

^(d) 2 Bl. Com. 515, 516. Evelyn *v.* Evelyn, Ambl. 192. . 344. S.C. 1 Stra. 710. S.C. Gilb. Rep. 189. Stanley *v.* Stanley, 1 Atk. 455.

^(e) Blackborough *v.* Davies, 1 Salk. 251. pl. 2. S.C. 1 P. Wms. 48, 49. (g) 4 Burn. Eccl. L. 374. 11 Vin. Abr. 196.

S.C. Lord Raym. 684. Blackborough *v.* Davis, Com. Rep. 26. pl. 95. (h) Stanley *v.* Stanley, 1 Atk. 457, 458.

^(f) Keylway *v.* Keylway, 2 P. Wms. (i) Duke of Rutland *v.* Duchess of Rutland, 2 P. Wms. 216.

to fall among brothers and sisters who are remotely related to the intestate; for the intestate is the subject of the act: it is his estate, his wife, his children, and for the same reason, his brothers' and sisters' children, for he is equally correlative to all (^k). [384] Therefore it has been held, that if the brother of an intestate hath a grandson, and a sister has a son, or daughter, the grandson shall not have distribution with the son, or daughter of the sister (^l). So it has been decreed, that if an intestate leave an uncle, and a deceased aunt's son, the latter shall have no distributive share (^m). Thus though as we have seen (ⁿ), among lineals representatives *ad infinitum* shall share in the distribution of an intestate's personal estate, yet among collaterals, except only in the instance of the intestate's brothers' and sisters' children, proximity of blood shall alone give a title to it.

The children of an intestate's brothers and sisters, who were deceased at his death, shall take *per capita*. Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased half-sister, the ten children of the deceased half-sister shall take ten parts in eleven with the son of the deceased brother (^o).

The words of the statute must be taken together. The expression *pro suo cuique jure* will let in any advantage of equality or preference which a person was entitled to by our law before the statute. Therefore a grandfather, although he be in an equal degree of consanguinity with the brother of the deceased, shall have no share with him in the distribution: for, by the common law, there was but one degree between brother and brother, and it would be unnatural to carry the personal estate up to the grandfather, who must be presumed to have been long before provided for, and to be going out of life (^p).

(^k) Carter *v.* Crawley, Raym. 496. Caldicot *v.* Smith, 2 Show. 286. Bee-ton *v.* Darkin, 2 Vern. 168. Maw *v.* Harding, *ibid.* 233. Pett *v.* Pett, 1 Salk. 250. S. C. Ld. Raym. 571. S. C. Com. Rep. 87. pl. 56. Pett's Case, 1 P. Wms. 25. Bowers *v.* Littlewood, *ib.* 595.

(^l) 1 Salk. 250. 1 Ld. Raym. 571. 1 P. Wms. 25. Com. Rep. 87. (^m) Bowers *v.* Littlewood, 1 P. Wms. 594. (ⁿ) Supr. 373. (^o) Ibid. 1 P. Wms. 595. (^p) Evelyn *v.* Evelyn, Ambl. 191. vid. supr. 90, 91.

So a grandfather shall exclude an uncle ; and, independently of the provisions of the statute, by the common law the former was entitled to a preference, as being of the right line, whereas [385] as the latter is only of the collateral line ; in other words, the grandfather is the root of the kindred, and the uncle is only the branch (q).

The law, of course, is the same in respect to grandmothers and aunts (r).

Where the next of kin are, a grandfather by the father's side, and a grandmother by the mother's, they shall take in equal moieties, as being in equal degree : for, in respect of such claims, as hath formerly been observed (s), dignity of blood makes no difference (t).

Uncles and nephews, aunts and nieces, are in equal degree. And where the intestate left two aunts, and a nephew and a niece, children of a deceased brother, Lord Hardwicke C. ordered the surplus to be divided into four parts equally among them, holding that as they were all in equal degree the children were to take in their own right and not by representation ; but that if their father had been living, he would have been entitled to the whole (u).

The grand-daughter of a sister, and the daughter of an aunt of the intestate are also in equal degree, and entitled to equal distribution (w).

The next of kin, though collateral, is preferred before a relation, though lineal, if he be of the ascending line, and more remote (x).

[386] Although the statute direct that no distribution shall be made till a year be elapsed from the death of the intestate, yet, if a person entitled to a distributive share shall die within the year, such interest shall be considered as vested in him, and

(q) *Blackborough v. Davis*, 1 Salk. 38.
251. S. C. Ld. Raym. 684. S. C. Com. Rep. 96. 108, 109. S. C. 12 Mod. 615.
Lloyd v. Tench, 2 Vez. 215. *Blackborough v. Davies*, 1 P. Wms. 41.
(r) *Com. Dig. Admon. H.* 1 Salk. 38.
251. *Woodroff v. Wickworth*, Prec. Ch. 527.

(s) Supr. 91.
(t) *Blackborough v. Davies*, 1 P. Wms. 53.
(u) *Durant v. Prestwood*, 1 Atk. 454.
(w) *Com. Dig. Admon. H.* *Thomas v. Ketteriche*, 1 Vez. 333.
(x) *Blackborough v. Davies*, 1 P. Wms. 51.

shall go to his personal representative; for this proviso makes no suspension or condition, precedent to the interest of the parties, but was inserted merely with a view to creditors.

The statute, also, is in the nature of a will framed by the legislature for all such persons as die without having made one for themselves; and, by consequence, the parties entitled in distribution resemble a residuary legatee: and it has been always held, that if such legatee die before the amount of the surplus is ascertained, still his representative shall have the whole residue, and not the representative of the first testator (^y).

Affinity, or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property: as, if A have a son and daughter, B and C, and they both die, the former leaving a wife, and the latter a husband; on A's dying afterwards intestate, such husband and wife have neither of them any claim on his estate.

Under a will, a wife is not one of the next of kin in the ordinary sense. Therefore where a testator gave the residue of his property "to be divided amongst my next of kin, as if I had died intestate," the widow was held not to be entitled to any share of such residue (^z).

A gift of property to *my nearest surviving relations* has been held to mean the testator's brothers and sisters, to the exclusion of nephews and nieces (^a).

If a bastard, or any other person having no kindred, die intestate, without wife or child, his effects, as we have seen (^b), [387] belong to the king, who, with the exception of a small part, usually grants them by letters patent or otherwise; and then such grantee seems of course entitled to the administration, and consequently to the sole enjoyment of the property (^c).

The personal property of an intestate, wherever situated, must be distributed according to the law of the country where his

(y) 3 Bac. Abr. 75. Brown v. Farnell, Carth. 51, 52. Freke v. Thomas, Comb. 112. Taylor v. Acres, 2 Show. 285. Palmer v. Allicock, Skin. 212. 218. S. C. 3 Mod. 58. 11 Vin. Abr. 92. Wilcocks v. Wilcocks, 2 Vern. 559. 3 P. Wms. 49, note (^d). Lee v. Cox,

3 Atk. 422. Vid. supr. 342.

(z) Garrick v. Lord Camden, 14 Ves. jun. 372.

(a) Smith v. Campbell, Coop. Rep. 275.

(b) Vid. supr. 107.

(c) 2 Bl. Com. 505. Doug. 542.

domicil was, and such is *prima facie* the place of his residence; but that may be rebutted; or supported by circumstances^(d); for although the locality of the party's abode at the time of his death determine the rule of distribution, yet it must be a stationary, not an occasional, residence, in order that the municipal institutions may attach on the property^(e). If, therefore, an Englishman be settled, and die in this country, and administration be taken out to him here, debts due to him, or other of his personal effects in *Scotland*, or abroad, shall be distributed according to the law of *England*^(f): But if an alien resident abroad die intestate, his whole property here is distributable according to the laws of the country where he so resides, otherwise no foreigner could deal in our funds but at the peril of his effects going according to our laws, and not to those of his own country^(g).

Where a native of *England* domiciled in *Guernsey* died intestate, leaving a widow and infant children, and the widow was appointed guardian of the children by the royal court of *Guernsey*, and sold the property of the intestate, and invested the produce in the *English* funds, and afterwards came to *England* with her children, and was domiciled there: A question arose on the death of some of the children under age, whether their shares of the property became distributable according to the law of *England* or of *Guernsey*; and it was held, that the law of *England* was to govern the succession, the domicil of the children being (according to the opinion of foreign jurists, our own law being silent on the subject) to follow the domicil of the surviving parent, where no fraudulent intention can be imputed. But fraud may be presumed where no reasonable cause appears for the removal^(h).

(d) 2 Ves. jun. 198. See also Sir Chas. Douglas's Case, there cited. *Dessebats v. Berquier*, 1 *Binn.* 344.

(e) 1 Wooddes. 385. *Pipon v. Pipon*, Ambl. 25. *Burn v. Cole*, ib. 415, 416.

(f) *Thorne v. Watkins*, 2 *Vez.* 35.

(g) 1 Wooddes. 585. *Pipon v. Pipon*, Ambl. 27.

(h) *Potinger v. Wightman*, 3 *Meri. Rep.* 67.

SECT. II.

Of distribution by the custom of London.

I PROCEED, in the last place, to consider the customs of the city of London on this subject, and also of the province of York, and the principality of Wales; which having peculiar customs of distributing intestates' effects, are expressly excepted from the operation of the statute.

Although the restraints in regard to the power of making wills, which subsisted in those respective districts, are now removed by different statutes; namely, the 4 & 5 W. & M. c. 2. explained by the 2 & 3 Ann. c. 5. for the province of York; the 7 & 8 W. 3. c. 38. for Wales; and the 11 G. 1. c. 18. for London; by which persons residing in those several places, and liable to those customs, are empowered to dispose of all their personal estates by will, and the claims of the widows, children, and other relations to the contrary are totally barred; yet those customs remain in full force with respect to such property of an intestate^(a), or where the deceased free-man agreed by writing, in consideration of marriage or otherwise, that his personal estate should be distributed according to the same. Their nature and incidents therefore demand now our attention.

[389] In the city of London^(b), and in the province of York^(c), as well as in the kingdom of Scotland^(d), and therefore, probably also in Wales^(e). (respecting the latter of which, little information is to be collected, except from the statute of W. 3.) the effects of the intestate, after payment of his debts, are in general divided according to the ancient doctrine of the *pars rationabilis*^(f), to which I have before alluded^(g).

(a) 2 Bl. Com. 493. 517, 518. L. of Test. 194. 3 P. Wms 19, in note.

(b) Redslaw v. Brasier, Ld. Raym. 1329. 4 Burn. Eccl. L. 387.

(c) 4 Burn. Eccl. L. 398.

(d) Ibid. 421.

(e) Ibid. 423. 442.

(f) 2 Bl. Com. 518. Off. Ex. 97.

(g) Supr. 81.

And first, as to the custom of London ; if a freeman of the city die, leaving a widow and children, his personal property, after deducting her apparel, and the furniture of her bed-chamber, is divided into three equal parts, one of which belongs to the widow, another to the children, and the third to the administrator in that character. If only a widow, or only children, they shall respectively in either case take one moiety, and the administrator the other (^b). If neither widow nor child, the administrator shall have the whole (ⁱ).

The portion of the administrator is styled in law the dead man's part. It is so called, because formerly, as we have seen (^k), the ordinary or his grantee was to dispose of it in masses for the deceased's soul. But, after the disuse of this superstitious practice, the administrator was wont to apply it to a better purpose, that is to say, for his own benefit (^l) ; till the legislature thought it was capable of an application still better ; and accordingly, by the stat. 1 Jac. 2. c. 17. declared, that it should be subject to the law of distributions.

Hence, if a freeman die worth eighteen hundred pounds personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts ; of which the widow shall have eight, six by the custom and two by the statute ; and each of the children five, three by the custom and two by the statute ; if he leave a widow and one child only, she shall still have eight parts as before ; and the child shall have ten, six by the custom, and four by the statute ; if he leave a widow, and no child, the widow shall have three-fourths of the whole, two by the custom, and one by the statute ; the remaining fourth shall go by the statute to the next of kin (^m).

A posthumous child shall come in for his customary share with the other children (ⁿ). But the custom extends merely to

(^b) *Northey v. Strange*, 1 P. Wms. 341. *Regina v. Rogers*, 2 Salk. 426. *Turner v. Jennings*, 2 Vern. 612. L. of Test. 210, 211. *Elliot v. Collier*, 3 Atk 527. (ⁱ) *Percival v. Crispe*, 2 Show. 175. Vid. L. of Test. 192.

(^k) Supr. 81.

(^l) *Anon.* 2 Freem. 85. *Matthews v Newby*, 1 Vern. 133.

(^m) 2 Bl. Com. 518. L. of Test. 209.

(ⁿ) *Walsam v. Skinner*, Prec. Chan. 499. L. of Test. 203. 11 Vin. Abr. 200. *Gilb. Eq. Rep.* 155.

the wife and children of the freeman, and not to his grand-children (°).

Hence if a freeman die intestate, leaving a wife but no child, yet if there hath been a child, and there be any legal representatives, that is, lineal descendants of such child, they are admitted to his distributive share of the dead man's part under the statute, though they are entitled to no part of his share by the custom. In that case, therefore, of the dead man's part by the statute, the wife shall have one third, and the representatives shall have the other two thirds; so that, dividing the whole personal estate into six parts, she shall have four, and the representatives two.

If there be neither wife nor child, nor such representative of a child, the whole shall be subject to the statute of distribution (P).

The custom attaches, although the freeman neither resided, nor died (q), nor left property (r) within the city.

In respect to the widow, I have already mentioned that she is entitled to her apparel and the furniture of her chamber, which is called the widow's chamber (s); or, in lieu of it, in case the estate shall exceed two thousand pounds, it has been said that she is entitled to fifty pounds (t). The privilege of the widow's chamber is analogous to her right to paraphernalia in general cases, and, like that, shall in no case be exercised to the prejudice of creditors (u).

[392] If she be provided for by a jointure before marriage in bar of her customary part, she is put in a state of nonentity

(°) *Northey v. Strange*, 1 P. Wms. 341. *Fowke v. Hunt*, 1 Vern. 397. *Regina v. Rogers*, 2 Salk. 426. *L. of Test.* 210.

(P) *L. of Test.* 192. 221, 222. *1 Vern.* 200.

(q) *L. of Test.* 202. 220. *Spencer's Case*, 1 Roll. Rep. 316. *Wilkinson v. Miles*, 1 Sid. 250. *Harwood's Case*, 1 Ventr. 180. *S. C.* 1 Mod. 80. *Rut-*

ter v. Rutter, 1 Vern. 180. *Chomley v. Chomley*, 2 Vern. 48. 82. *Webb v. Webb*, ib. 110.

(r) *Priv. Lond.* 288.

(s) *2 Bl. Com.* 518.

(t) *7 Vin. Abr.* 2. tit. *Customs*, B. 2. *Briddle v. Briddle*, 4 Burn. Eccl. I. 388.

(u) *Swinb.* p. 6. s. 13.

with regard to the custom only (^w) ; but she shall still be entitled to her share of the dead man's part under the statute of distributions (^x). But if the jointure is expressed to be in bar of her dower, without saying more, this shall not bar her of her customary share of the personal estate, for land is wholly out of the custom (^y). Such also is the case, if the intestate covenant to lay out money in a purchase of land by way of jointure, for the money has in equity all the qualities of land (^z).

And *à fortiori* she shall not be excluded from her customary share, if the settlement be so expressed ; as if it contain a proviso, that she shall not be barred or deprived of her right to dower, or of taking any other gift, provision, or bequest her husband shall think fit to give, or leave her by deed or will, or any other means whatsoever (^a). On the other hand, the settlement may be expressly in bar as well of her share of the dead man's part as of her share by the custom, and then she shall be excluded from both (^b) : or if it be made in satisfaction of all her demands out of his personal estate by the custom, or [393] otherwise, she shall be barred also of her share under the statute (^c) : or it may thus operate on the evident though only implied intention of the parties (^d).

If the wife be divorced for adultery *à mensâ et thoro*, she forfeits her customary share (^e).

If a freeman leave several children, the share or the orphanage part of any one of them is not vested in him by the custom till the age of twenty-one, after which period, but not be-

(^w) Hancock *v.* Hancock, 2 Vern. 665. Blunden *v.* Barker, 1 P. Wms. 644. Cleaver *v.* Spurling, 2 P. Wms. 527. Lewin *v.* Lewin, 3 P. Wms. 16. Pusey *v.* Desbouverie, 315. Medcalfe *v.* Medcalfe, 1 Atk. 64. Morris *v.* Burroughs, 403. Tomkyns *v.* Ladbroke, 2 Vez. 592.

(^x) Benson *v.* Bellasis, 1 Vern. 15. 2 Chan. Rep. 252. Whithill *v.* Phelps, Prec. Ch. 327.

(^y) 1 Eq. Ca. Abr. 158, 159. Babington *v.* Greenwood, 1 P. Wms. 531. Blunden *v.* Barker, 647. Babington

v. Greenwood, Prec. Chan. 505. L. of Test. 214.

(^z) S. C. 1 P. Wms. 532.

(^a) Kirkman *v.* Kirkman, 2 Bro. Ch. Rep. 95.

(^b) 1 Eq. Ca. Abr. 153. Atkyns *v.* Waterson, Gilb Eq. Rep. 95. S. C. L. of Test. 214. Babington *v.* Greenwood, 1 P. Wms. 531.

(^c) 7 Vin. Abr. 211. Benson *v.* Bellasis, 1 Vern. 15. 4 Burn. Eccl. L. 404. Vid. L. of Test. 212, 213

(^d) L. of Test. 212. L. of Lond. 102.

(^e) Pettifer *v.* James, Bumb. 16.

fore, he may dispose of it by will, or, in case of his dying intestate, it shall be distributed pursuant to the statute. If he die under that age, whether sole or married, his share shall survive to the others^(f); whereas the share by the statute is vested, and therefore such child may devise it at the age of fourteen, if a son, and at twelve, if a daughter^(g). But the survivorship of the orphanage part holds only as to the orphanage part belonging to the deceased himself, for if *he* had by survivorship the part of any of his brothers or sisters, that shall go according to the statute^(h). In case there be only one child, his orphanage part is vested in him, in the same manner as his share by the statute, and is devisable by him at the same age⁽ⁱ⁾. [394] If a man marry an orphan under the age of twenty-one, it seems his right is so vested as to prevent his wife's share from surviving, in case of her death, before she attains that age^(k).

The children of a freeman are entitled to the benefit of the custom, although they were born out of the city^(l).

If any of the children are advanced to the full extent of the custom by the father in his lifetime, they shall be entitled by the custom to no further dividend^(m). If a freeman have several children, and fully advance them all, the custom in regard to them is satisfied, and his personal estate, independent of the widow's customary share, shall be distributed according to the statute. If he has only one child, and fully advances him, the consequence is the same⁽ⁿ⁾. If the children are advanced only partially, they must bring their portion into hotchpot before they can derive any advantage from the custom; and in that case their portion must be so brought in with the other brothers and sisters, but not with their mother, for the principle here

^(f) 2 Bl. Com. 519. *Wilcocks v. Wilcocks*, 2 Vern. 558. *Jesson v. Essington*, Prec. Ch. 207. 537.

^(g) *Vid. supr.* 8.

^(h) *Jesson v. Essington*, Prec. Ch. 537.

⁽ⁱ⁾ 3 P. Wms. 318. note^(q). *Vid. also Prec. Chan.* 207.

^(k) *Fouke v. Lewen*, 1 Vern. 88. sed *vid. Prec. Ch.* 537.

^(l) L. of Test. 202. *Harwood's Case*, 1 Ventr. 180. S C. 1 Mod. 80.

^(m) *Cleaver v. Spurling*, 2 P. Wms. 527.

⁽ⁿ⁾ L. of Test. 206. 221. *Cleaver v. Spurling*, 2 P. Wms. 527. *Goodwin v. Ramsden*, 1 Vern. 200. *Hancock v. Hancock*, 2 Vern. 666. *Medcalf v. Medcalf*, 1 Atk. 64.

also is to make an equality among the children, and not to benefit the widow (^o). Nor, where a freeman has in part advanced his only child, shall such child bring in his advancement, for [395] there is none to claim with him of equal degree (^p). And where one of several such children is advanced, his advancement shall be in satisfaction merely of his orphanage share, but not of his share of the dead man's part, to the whole of which he shall be entitled, without regard to what he shall have received from his father (^q).

In case such advancement be brought into hotchpot, it must be brought into the orphanage part only (^r).

If the advancement shall have exceeded the child's share by the custom, whether he must bring in such excess before he is entitled to his share of the part distributable by the statute, is a point on which there are opposite opinions. By some writers it has been held, that he has a claim to his full share by the statute, without any retrospect to his advancement, whatever might have been its amount. By others it has been maintained, that he has no right to such distributive share, unless he bring into the same so much of his advancement as exceeded his proportion of his customary part (^s). To reconcile this variance, a distinction has been suggested between an advancement given and accepted expressly in satisfaction of the customary share, and an advancement given generally without any such agreement or stipulation: That, in the former case, in [396] the distribution of the dead man's part, no respect shall be had to the advancement, as it is considered in the light of a purchase by the child, and might have happened to be less as well as greater in point of value than the customary part. But where there is no such special contract or agreement, and the advancement is general, it shall be applied either to the cus-

(^o) L. of Test. 204. *Annand v. Honeywood*, 1 Vern. 345. *Beckford v. Beckford*, 2 Vern. 281. 2 Bl. Com. 519. *Bright v. Smith*, 2 Freem. 279. 1 Eq. Ca. Abr. 155. *Cleaver v. Spurling*, 2 P. Wms. 526. *Garon v. Trippet*, Ambl. 189.

(^p) *Regina v. Rogers*, 2 Salk. 426. *Fane v. Bance*, 2 Vern. 234. *Dean v.*

Lord Delaware, ib. 628. *Stanton v. Platt*, ib. 754.

(^q) *Hearne v. Barber*, 3 Atk. 214. *Wood v. Briant*, 2 Atk. 523.

(^r) *Beckford v. Beckford*, 1 Vern. 345.

(^s) *Vid. 4 Burn. Eccl. L. 406. Gudgeon v. Ramsden*, 2 Vern. 274.

tomary share only, or both to the customary and distributive share, according to the amount of the advancement^(t).

As to the nature of the advancement, whether complete or partial, it must arise exclusively from the personal estate. In the establishment of the custom, the citizens of London had no regard to real property, on supposition that a freeman would not purchase land, but would employ his whole fortune in commerce^(u). If therefore a citizen settle a real estate on a child, it shall be no advancement^(v); nor, although it be expressly for that purpose, shall it bar him of his orphanage part^(x). Nor if money be given by the father to be laid out in land to be settled on the son on his marriage, shall it be deemed personal estate, nor any exclusion^(y).

What has been already stated in general cases^(z) respecting small presents made to the child by the father; his disbursements for the child's maintenance and education, or placing him out apprentice^(a); a legacy left him by the father dying partially intestate^(b); property given him by any other than his father, as well as a fortune of the child's own raising, is here equally applicable. He is not by any of these means advanced. For that purpose it must be a provision made for him by the father, while living, out of his personal property^(c). In short, there must, in all instances of this nature, be a valuable consideration moving from the father, and an actual benefit accruing to the child^(d). Indeed, it has been made a question whether such provision as shall amount to an advancement should not be made on marriage, or in pursuance of a marriage

^(t) 4 Burn. Eccl. L. 207.

^(u) 1 Eq. Ca. Abr. 150. Tomkyns v. Ladbroke, 2 Vez. 593.

^(w) 1 Ch. Ca. 160. 235. L. of Test. 194. Tiffin v. Tiffin, 1 Vern. 2. Cox v. Belitha, 2 P. Wms. 274.

^(x) 2 Ch. Ca. 160. vid. Civil v. Rich, 1 Vern. 216.

^(y) Annand v. Honeywood, 1 Vern. 345.

^(z) Vid. supr. 380.

^(a) Sed vid. Morris v. Burroughs, 1 Atk. 403.

^(b) Vid. Car v. Car, 2 Atk. 277.

^(c) Laws of Lond. 82. Jenks v. Holford, 1 Vern. 61. 4 Burn. Eccl. L. 412.

415. Vid. Elliot v. Collier, 1 Vez. 17. Hearne v. Barber, 3 Atk. 213. 452. 3 P. Wms. 317, note^(e). Elliot v. Collier, 1 Wils. 168.

^(d) L. of Test. 204. Jenks v. Holford, 1 Vern. 61. Fowke v. Lewen, 89. Civil v. Rich, 216. Morris v. Burroughs, 1 Atk. 403. Elliot v. Collier, 3 Atk. 528.

agreement (^e). But, it seems, the custom on this head is not so restricted, but extends to any other establishment of the child in life (^f).

If the child, whether the only one or not, be married in the lifetime of the father with his consent, although such child were not fully advanced, yet, to entitle himself to a further portion, he must produce a writing under his father's hand, expressing the value of the advancement, in order that it may be ascertained what proportion it bore to his share by the custom (^g). If no such writing be produced, or if, on the production of such writing, the specific amount does not appear on the face of it, [398] such advancement shall be presumed to have been complete, till the contrary be shown (^h). But mere parol declarations of the father, that he had fully advanced the child, whether with or without a specification of the value, shall be of no avail (ⁱ).

Thus, from what has been stated, it appears, that if a freeman die intestate, leaving no wife, and an only child, whether the child be fully advanced, or partially advanced, or not advanced; in either of these cases the child was entitled to the whole personal estate (^k). If he be fully advanced, he shall have nothing by the custom, but shall have all as next of kin: If he be partially advanced, since he has no brother or sister, with whom to bring his partial advancement into hotchpot, he shall have one half by the custom, and the other half by the statute: If he be not advanced, he shall have one half by the custom, and the other half by the statute (^l).

If the freeman leave no wife, but several chidren, as for instance three, one of whom is advanced, another partly advanced, and the third not advanced; in this case the child partly advanced, and the child not advanced, after the former has brought

(^e) 1 Vern. 61. 89. Vid. also Hearne

v. Barber, 3 Atk. 213.

(^f) L. of Test. 204. Morris v. Burroughs, 1 Atk. 403. See also Northeys v. Strange, 1 P. Wms. 342.

(^g) Chace v. Box, Ld. Raym. 484. 1 Eq. Ca. Abr. 154. 4 Burn. Eccl. L. 393. L. of Test. 203. Hume v. Edwards, 3 Atk. 451, 452. Elliot v. Collier, 527.

Fawkner v. Watts, 1 Atk. 406.

(^h) Cleaver v. Spurling, 2 P. Wms. 527. 4 Burn. Eccl. L. 408. in note. Elliot v. Collier, 3 Atk. 527.

(ⁱ) Vid. Blunden v. Barker, 1 P. Wms. 634. Cleaver v. Spurling, 2 P. Wms. 527. Fawkner v. Watts, 1 Atk. 407.

(^k) Vid. 4 Burn. Eccl. L. 417.

(^l) Vid. 4 Burn. Eccl. L. 417.

in his partial advancement, shall share one half equally between them by the custom ; and the other half, namely the dead man's part, although the first child have been fully advanced, shall, without his bringing his advancement into hotchpot, be distributed by the statute equally amongst them all.

[399] If such advancement exceeded his orphanage part, then, whether the excess shall go in satisfaction of his distributive share by the statute, or not, seems to depend on the provision being expressly in satisfaction of the orphanage part, or whether it be general, and without any stipulation (^m).

The interest which a child has in such orphanage part is a mere contingency, and no present right, and therefore a release of it is not valid in point of law ; but, if founded on a valuable consideration, shall operate as an agreement, and be binding in equity (ⁿ). Therefore, a freeman's child, if of age, may in consideration of a present fortune, waive all claim to the orphanage part : as where the father, on the marriage of his daughter who had attained twenty-one years, agreed to give her three thousand pounds, and she covenanted to receive that sum in full of such share : this, as there was no fraud in the transaction, was held in equity to be a good bar of the custom (^o). So if A, who is of age, marry a freeman's daughter, who is an infant, he may, on receiving an adequate portion, bar himself of any future right to a customary estate in virtue of the marriage by a release of all future right, or by a covenant to release it when it shall accrue (^p). Indeed, if the latter mode be adopted, the wife, if under age, would not be barred by the covenant ; and in case of his death before the execution of the re- [400] lease, she would by survivorship be entitled to the share, as a *chose in action* not recovered or received by her husband ; but if he be living when the right accrues, as he clearly may release it, and his release will bind her, therefore it is reasonable he should perform his covenant. It is highly expedient that articles of this nature should be carried into execution ; and

(^m) *Vid. supr.* 395.

(^o) 2 Eq. Ca. Abr. 272. *Lockyer v.*

(ⁿ) *Blunden v. Barker*, 1 P. Wms.

Savage, Stra. 947.

636. 639. *Cox v. Belitha*, 2 P. Wms.

(^p) *Cox v. Belitha*, 2 P. Wms. 272.

273.

Ives v. Medcalf, 1 Atk. 63.

that when the father is bountiful to his children in his lifetime, he should have his affairs settled to his satisfaction at his death^(q). But such release shall be altogether ineffectual if in any manner extorted, or obtained by undue influence^(r), or without consideration^(s).

These points are indeed less likely to occur, in consequence of the authority given to a freeman by the above-mentioned stat. *Geo. 1.* of disposing by will of his whole personal estate, without regard to the custom.

SECT. III.

Of distribution by the custom of York—and of Wales.

THE custom of York, as it regards the widow, varies from that of London only in this respect, that she is allowed to reserve to her own use not only her apparel and furniture of her [401] chamber, but also a coffer box containing various ornaments of her person, as jewels, chains, and other articles of the like nature^(a).

As relative to children, the custom of York differs in two material points from the custom of London. In the city, as we have seen, a child's orphanage part is fully vested till he attains the age of twenty-one. In the province it is vested immediately on the death of the intestate^(b). In the city, we may remember, the advancement of a child cannot arise out of a real estate. In the province the heir at common law, who inherits any land either in fee or in tail, is divested of all claim to any filial portion^(c). And, however small in point of value the land

(q) *Ibid.* 1 Atk. 63.

(r) *Heron v. Heron*, 2 Atk. 160. *Blunden v. Barker*, 1 P. Wms. 639.

(s) *Ives v. Medcalf*, 1 Atk. 63. *Morris v. Burroughs*, 402. *Heron v. Heron*, 2 Atk. 161. *Blunden v. Barker*, 1 P. Wms. 639. *Cox v. Belitha*, 2 P. Wms.

273.

(a) *Off. Ex. Suppl.* 61, 62. *Swinb.* p. 6. s. 9.

(b) 2 Bl. Com. 519. 4 Burn. Eccl. L. 398.

(c) 2 Burn. Eccl. L. 409. *L. of Test.* 221. *Constable v. Constable*, 2 Vern S75.

may be in comparison with the personal estate, he is nevertheless excluded (^d), and even although the estate he inherits be only a reversion (^e). He is also barred, though the land devolved upon him by settlement made on his father's marriage (^f). Nor, in case lands held by a mortgage in fee descend to him before redemption, shall he be entitled to a filial portion; but on redemption of the mortgage, and payment of the money to the [402] administrator, it seems he shall be entitled to such portion, because then he has nothing by inheritance, nor in fact has had any preferment (^g).

The principles established in regard to advancement on the construction of the statute of distributions, apply in general to such as is pursuant to the custom of this district (^h); but as here land as well as money constitutes an advancement, the heir at law under the custom is excluded by his inheritance of land, either in fee or in tail (ⁱ): Whereas such inheritance is no bar by the statute; but, as well under the custom as under the statute, younger children in respect to advancement are on the same footing. It is essential, in order to the custom of York's attaching, that the intestate should be resident, at the time of his death, within the province; but for that purpose, it is immaterial where his estate is situated.

In case a freeman of London shall die within the province, the custom of the city for the distribution of his effects shall prevail, and shall control the custom of the province of York. Therefore in that case the heir shall come in for a share of the personal estate; for the custom of the province is only local, and circumscribed to a certain district; but that of London, as above stated, follows the person, although ever so remote from the city (^k).

[403] With these distinctions the custom of London and those of York in the main agree, and appear to be substantially the same (^l).

(^d) 4 Burn. Eccl. L. 409.

375.

(^e) Ibid. 409, 410.

(^h) 4 Burn. Eccl. L. 416. Chomley v. Chomley, 2 Vern. 47. 82. Supr. 391.

(^f) Ibid. 410. Constable *v.* Constable, 2 Vern. 375.

(^l) 2 Bl. Com. 519. 1 Vern. 15. 134. 200. 305. 432. 465. 2 Ch. Rep. 255.

(^g) 4 Burn. Eccl. L. 410.

L. of Test. 221, 222. Swinb. p. 3. s. 16. 4 Burn. Eccl. L. 398, et seq.

(^h) Vid. Elliot *v.* Collier, 1 Vez. 17.

(ⁱ) Constable *v.* Constable, 2 Vern.

Thus, if an intestate in the province of York die seised of an estate in fee simple, leaving a widow and three sons; the widow in that case shall have one third of the whole personal estate under the custom, the other third shall be divided equally between the two younger sons, and of the remaining third the widow shall take one third under the statute, and the other two thirds shall be divided equally among the three sons; for the heir is barred merely of his orphanage part, but not of his share, by the statute.

In respect to Wales (^m), we may learn, in general, from the stat. 7 & 8 W. 3. c. 38, above referred to (ⁿ), that the doctrine of the *pars rationabilis* extends to intestates' effects within that principality; but the books contain no further information on the subject.

(^m) 4 Burn. Eccl. L. 424. Off. Ex. 97, (n) Supr. 388.

^m note. ibid. Suppl. 72.

CHAP. VII.

OF THE POWERS AND DUTIES OF LIMITED ADMINISTRATORS—
OF JOINT ADMINISTRATORS.

THERE are certain powers and duties which belong in common to all special and limited administrators. Whether the administration be committed *durante minoritate*, *durante absentiā*, or *pendente lite*, or whether such special and limited administration be granted with or without a will annexed, or in a general or restrictive form only, as *ad usum et commodum infantis*; they are all invested in some respects with the same authority^(a). They may perform all such acts as cannot be delayed without prejudice or danger to the estate. They may sell *bona peritura*, cattle which are fattened, grain, fruit, or any other substance which may be the worse for keeping^(b): They may pay debts which were due from the deceased at the time of his death^(c), or for the payment of them they may dispose of effects not perishable^(d). They may also in such respective [405] characters receive debts due to the deceased^(e), or may maintain actions for the recovery of the same^(f): for, in all these and the like instances, the urgency of the case requires them immediately to act. They have also, it seems, the privilege of retaining for debts owing to themselves^(g).

If administration be granted generally during infancy, the grantee has authority to make leases of any term vested in the

(a) *Walker v. Woolaston*, 2 P. Wms. 576.

(b) 3 Bac. Abr. 13. 11 Vin. Abr. 102, 103. 1 Roll. Abr. 910. Anon. 3 Leon. 278. 2 Anders. 132. pl. 78. *Price v. Simpson*, Cro. Eliz. 718. 5 Co. 9. Godb. 104.

(c) *Com. Dig. Admon. F.* Vid. *Briers v. Goddard*, Hob. 250. 5 Co. 29 b.

(d) 5 Co. 29 b. 2 Anders. 132. pl. 78.

(e) *Com. Dig. Admon. F.* Vid. *Anon. 3 Leon. 103.*

(f) *Walker v. Woolaston*, 2 P. Wms. 576. 1 Roll. Abr. 888. *Bearblock v. Read*, 2 Brownl. 83. *Slaughter v. May*, 1 Salk. 42. *Ball v. Oliver*, 2 Ves. & Bea. 97.

(g) *Com. Dig. Admon. F.* *Semb. Raym.* 483.

infant executor, which shall be good till he come of age, and, as it has been also held, till he enter^(h). Such administrator has also, it seems, a right, in case the administration were granted with the will annexed, to assent to a legacy⁽ⁱ⁾. But if the administration were committed with special words of restraint in the form I have just mentioned, such administrator is incapable of making leases^(k), or of assenting to a legacy^(l). Nor shall the power of an administrator during infancy, although the grant were general, extend to the prejudice of the infant. Therefore such administrator has no authority to transfer the property by sale, except in cases of necessity; nor to sell leases even for the payment of debts, if there be other property which he may dispose of to more advantage^(m); nor to assent to a legacy, unless there be assets for its payment⁽ⁿ⁾; nor to release a debt without actually receiving it^(o): for although, as we may remember, if A, an infant, be appointed executor, and B be nominated to act in that character during A's minority, B seems to be possessed of the same powers as an absolute executor^(p); yet a distinction has been taken between him and an administrator *durante minoritate*. To B, the property in the effects was confided by the owner himself, though but for a limited time, and in a special manner; whereas such administrator is appointed by the ordinary in consequence of the legal disability of the executor, who by the will is constituted to act immediately^(q). Such acts, therefore, as are performed by such administrator to the injury of the infant, shall be altogether ineffectual.

By the stat. 38 Geo. 3. c. 87. s. 7. an administrator *durante absentiā* has the same powers vested in him as an administrator during the minority of the next of kin.

An administrator *pendente lite*, whether the suit relates to a will or the right of administration, seems to be on the same footing as an administrator during infancy, to whom the grant

^(h) 6 Co. 67 b. Off. Ex. 215.

⁽ⁿ⁾ 5 Co. 29 b.

⁽ⁱ⁾ Off. Ex. 215. 5 Co. 29 b.

^(o) 1 Roll. Abr. 910, 911.

^(k) 6 Co. 67 b. Off. Ex. 215.

^(p) Vid. supr. 357.

^(l) Off. Ex. 215.

^(q) Off. Ex. 215, 216. 11 Vin. Abr. 103.

^(m) 2 Anders. 132. pl. 78.

[407] is made in the special and limited manner above mentioned (r). [1]

On an infant executor's coming of age, he may sue out a *scire facias* on a judgment recovered by the administrator *durante minoritate*. In like manner, in case an administrator, *pendente lite* touching a will, obtain such judgment, the executor, on proving the will, by which the administration will be determined, may take advantage of the judgment by *scire facias* (s).

If an action be brought against a special administrator, and, pending the action, the administration determine, it has been held he ought to retain assets to satisfy the debt, which is attached on him by the action (t); but that is on the supposition the action does not in that event abate; whereas it seems that such would be the consequence (u). If judgment be obtained against such administrator, and afterwards the executor come of age, a *scire facias* will clearly lie against the executor on the judgment (w).

Of co-executors, we have seen (x), the acts of any one in respect to the administration of the effects are deemed by the law to be the acts of all, inasmuch as they have a joint and entire authority over the whole property; but joint administrators have been considered in a different light. Their power arises not from the act of the deceased, but from that of the ordinary; and administration, it has been already stated (y), is in the nature of an office: Hence it has been held, that if granted to several persons, they must all join in the execution of it, nor shall the act of one only be binding on the rest, and that

(r) Vid. 3 Bac. Abr. 56. 11 Vin. Abr. 106. Walker *v.* Woolaston, 2 P. Wms. 576. and supr. 74.

(s) Ibid. 2 P. Wms. 587.

(t) 3 Bac. Abr. 14. Sparks *v.* Crofts, Comb. 465.

(u) 11 Vin. Abr. 97. Ford *v.* Glanville, Moore, 462. Goldsb. 13. Luew. 342.

(w) Sparks *v.* Crofts, Ld. Raym. 265. S. C. Carth. 432.

(x) Supr. 359.

(y) Supr. 114.

[1] An administrator *pendente lite* has no power to make distribution of an estate. But if such administrator have made distribution according to law, the Court will not compel him to refund, that the present administrator may pay it again to the same person. *Case of Bradford's Adm'rs.* 1 Browne, 87.

therefore one of several administrators cannot, like one of [408] several co-executors, convey an interest, or release a debt, without the others^(z). But this distinction has been overruled, and it seems to be now settled that a joint administrator stands on the same footing, and is invested with the same powers, as a co-executor^(a).

If one of the administrators die, the right of administering will survive without a new grant^(b).

By the stat. 38 Geo. 3. c. 87. s. 4. in case of the absence of an executor for a year after the testator's death out of the jurisdiction of his majesty's courts, and a suit be instituted in a court of equity by a creditor, the court in which the suit shall be pending is empowered to appoint persons to collect outstanding debts or effects due to the testator's estate, and to give discharges for the same, who are to give security in the usual manner duly to account.

(z) 4 Burn. Eccl. L. 272. Ld. Bacon's Tracts, 162. Hudson *v.* Hudson, 1 Atk. 460.

(a) Jacomb *v.* Harwood, 2 Vez. 267.

Willand *v.* Fenn in B. R. cited ibid.

(b) Adams *v.* Buckland, 2 Vern. 514. Eyre *v.* Countess of Shaftsbury, 2 P. Wms. 121. Supr. 114.

CHAP. VIII.

OF ASSETS AS DISTINGUISHED INTO REAL AND PERSONAL,
LEGAL AND EQUITABLE—OF MARSHALLING ASSETS.

IN treating of debts and legacies, I have hitherto supposed them to be payable out of the personal estate only, and indeed that is the natural fund for their satisfaction ; but the real property may also be applied to the same purpose.

On the subject of such application, it is necessary to consider assets under different denominations. Assets, then, are either real or personal, legal or equitable (^a).

Those of which I have been treating are legal and personal.

I proceed now to advert to such as are legal and real. Lands descended to the heir in fee simple are for the benefit of specialty creditors of this description ; as is even an advowson which is so descended (^b).

These assets are sometimes styled assets by descent, as per-
[410] sonal assets are called assets *enter mains*, that is, in the hands of the executor (^c).

Whether an estate *pur autre vie*, in case it be not devised, shall be real or personal assets, depends on there being or not being a special occupant. The statute of frauds enables the proprietor of such estate to devise it, and enacts that, if no devise be made, it shall be chargeable in the hands of the heir, if it come to him by reason of special occupancy, as assets by descent, as in the case of lands in fee simple. And if there be no special occupant, it shall go to the executor, and be assets in his hands (^d).

A term in gross is, as we have seen, personal assets (^e). But if the term be vested in a trustee, and attendant on the inheri-

(^a) Vid. 4 Burn. Eccl. L. 288.

(^b) 3 Wooddes. 483. Robinson *v.* Tonge, 3 P. Wms 401.

(^c) Terms of the Law. Shep. Touch. 496.

(^d) 2 Fonbl. 2d edit. 896 note R. b.

Westfaling *v* Westfaling, 3 Atk. 466. Atkinson *v.* Baker, 4 Term Rep. 229.

Milner *v.* Lord Harewood, 18 Vez. 273.

(^e) Supr. 140.

tance, it is real assets (^f). So a term in trust, attendant on a fee in trust, shall be real assets in the hands of the heir; for the statute of frauds having made a trust in fee assets in the hands of the heir, the term which follows the inheritance, and which is subject to all charges attending the inheritance, must be so also (^g). But we have seen, that, generally speaking, the trust of a term is not made assets by that statute (^h).

[411] Creditors by specialties, which affected the heir, provided he had assets by descent, had not the same remedy against the devisee of their debtor, and were therefore liable to be defrauded of their securities. To obviate this mischief (ⁱ), the stat. 3 W. and M. c. 14. has enacted, that all devises of real estates by tenants in fee simple, or having power to dispose by will, shall, as against such creditors, be deemed to be fraudulent and void; and that they may maintain their actions jointly against the heir and devisee. But devises for payment of debts, and for raising portions for younger children, in pursuance of an agreement before marriage, are expressly excepted by the statute (^k). And thus freehold interests devised for other than the just purposes aforesaid, are become, in favour of specialty creditors, real assets at law, without the assistance of a court of equity: in respect to which such creditors may elect to resort in the first instance against the heir and devisee, without suing the personal representative of their deceased debtor (^l). If such creditor file a bill in equity on the statute to affect the real assets in the hands of the devisee, the heir must be made a party to the suit; for a bill in equity for that purpose is in the nature of an action at law; and as the action by express provision of the statute is to be brought jointly against the heir and devisee, so the bill must be filed against them both (^m); though in such case the heir or devisee shall have this relief—

(^f) 2 Fonbl. 2d edit. 114, note R. Vid. supr. 5 & 137.

(^g) 2 Fonbl. 2d edit. 114, note S. Herd. 489. Willoughby *v.* Willoughby, 1 Term Rep. 766.

(^h) Supr. 143.

(ⁱ) Vid. 2 Bl. Com. 378.

(^k) Vid. 2 Atk. 104. 292. Earl of Bath *v.* Earl of Bradford, 2 Vez. 590. Lin-

gard *v.* Earl of Derby, 1 Bro. Ch. Rep. 311. Hughes *v.* Doulben, 2 Bro. Ch. Rep. 614. Com. Dig. Assets, A.

(^l) 3 Wooddes 486. Warren *v.* Statewell, 2 Atk. 125. Madox *v.* Jackson, 3 Atk. 406. Knight *v.* Knight, 3 P. Wms. 333. Vid. Manaton *v.* Manaton, 2 P. Wms. 234.

(^m) Gawler *v.* Wade, 1 P. Wms. 99

namely, to stand in the place of the specialty creditor, and reimburse himself out of the personal estate⁽ⁿ⁾.

It seems that an estate *pur auter vie*, although no special occupant were named, would, in case it were devised, be considered as real assets^(o).

But copyhold estates are not assets in the hands of the heir^(p), [412] and consequently are not comprehended within the provisions of this statute.

Between legal and equitable assets the distinction is this: legal assets are such as constitute the fund for the payment of debts according to their legal priority; whereas equitable assets are those which can be reached only by the aid of a court of equity, and are subject to distribution on equitable principles, according to which, as equity favours equality, they are to be divided *pari passu* among all the creditors^(q).

By the stat. 21 H. 8. c. 5. s. 5. it is enacted that if lands are devised to be sold, neither the money produced by the sale, nor the future profits of the land, shall be considered as forming any part of the personal estate of the devisor. But this provision was formerly construed to apply merely to devises of lands to be sold by persons not executors, or by executors in conjunction with other persons; in which cases it was held, that neither the land nor the money was to be regarded as legal assets, but merely subject to an equitable appointment, inasmuch as the parties empowered to sell were not trusted with it in respect of executorship^(r).

[413] That in case lands were devised to an executor, to be sold by him in that capacity for the payment of debts and legacies, the money arising from the sale should be legal assets as well as the intermediate profits; for that by the devise the de-

⁽ⁿ⁾ Clifton v. Burt, 1 P. Wms. 680.

^(t) 3 Bac. Abr. 58. Roll. Abr. 920.

^(o) Vid. 2 Fonbl. 2d edit. 396, note b.

Edwards v. Graves, Hob. 265 Dyer,

^(p) 4 Co. 22. Robinson v. Tonge, cited 1 P. Wms. 679, note 1.

151 b. 264 b. Girling v. Lee, 1 Vern. 63. Anon. 2 Vern. 405. 4 Burn. Eccl.

^(q) 3 Bac. Abr. 59, in note. 2 Fonbl. 402, note ^(d). 4 Burn. Eccl. L. 288. 3 Wooddes. 486. 2 P. Wms. 416. note 2.

L. 260. 11 Vin. Abr. 291. Cutterback v. Smith, Prec. Chan. 127. Sed vid. Off. Ex. 74, 75.

scent was broken, and the estate in the land vested in the executor, *quà* executor for the purposes directed by the will^(s).

But the doctrine of equitable assets, in its principle so consonant to natural justice, has been gradually extended; and this distinction between a devise to a trustee and to an executor has been continually qualified, till at length it appears to be altogether abolished.

In one class of cases; both of an earlier and of a later date, courts of equity recognizing the union of the two characters of trustee and of executor in the devisee, regarded on that ground the real estate as merely a trust fund, and distributable among all the creditors equally^(t). And other cases considered it in the same light, although the devise were not to the executor expressly on trust, if, according to the sound construction of the will, he might be converted into a trustee; as if the devise were to him and his heirs; since the money could never be legal assets in the hands of his heir; nor, as against such heir, could an action be maintained by a creditor^(u).

According to other decisions, if the executor had only a naked power to sell in the capacity of executor, the lands descended in the meantime to the heir of the devisor, and till the sale, he might enter and take the profits^(v); and the money arising from such sale was held to be assets at law^(x).

But by modern adjudications it seems to be established that a devise to a mere executor shall bear the same construction as a devise to a trustee; that there is no reason to suppose the testator's meaning to be different in the one instance from that in the other; and that, even in the case of a mere power on the part of the executor to sell, the descent seems to be broken, inasmuch as the vendee is in by the devisor; but that, whether the descent in such case be broken or not, the assets shall be equally equitable: in short, that if the real estate be by any

(s) 3 Bac. Abr. 58. 1 Roll. Abr. 920.
Harg. Co. Litt. 236.

(t) 2 P. Wms. 416, note 2. 2 Fonbl. 402, 403. Anon 2 Vern. 133. Challis v. Casborn, Prec. Chan. 408. Chambers v. Harvest, Mose. 123. Anon.

328. Lewin v. Okeley, 2 Atk. 50. Batson v. Lindegreen, 2 Bro. Ch.

Rep. 94.

(u) 1 Bro. Ch. Rep. Append. 7. 1 Bro. Ch. Rep. Newton v. Bennet, 135. 138, in note.

(v) Co. Litt. 236.

(x) Newton v. Bennet, 1 Bro. Ch. Rep. 135. 138, in note. See Tomlinson v. Dighton, 1 P. Wms. 151.

means given to the executor, the produce of it, when sold, shall not be applied in a course of legal administration, but be distributed as equity prescribes (^y).

And although it has been held that where the estate descends [415] to the heir charged with the payment of debts, it will be legal assets in him (^z); yet now it is settled that in this instance also the assets shall be deemed to be equitable (^a).

But such assets as are clearly legal shall not assume, by being recoverable only in equity, an equitable nature. Hence, if a mere trust estate descend on the heir at law, notwithstanding a necessity of resorting to equity to reduce it into possession, yet it shall be legal assets, since a trust estate is made assets by the statute of frauds. And although an equity of redemption of a mortgage in fee, not being made assets by any legislative provision, has been considered as merely an equitable interest, and has been expressly adjudged to be equitable assets (^b); yet there are strong opinions to the contrary, and that an equity of redemption, even in fee, though capable of being reached only in equity, shall be classed among assets at law. And although, from the same inclination of extending the ideas of equitable assets, it has been also held that if any termor for years mortgage his term, the equity of redemption shall be of that description of assets (^c); still, according to a variety of antecedent cases, such chattels, whether real or personal, as are mortgaged [416] or pledged by the testator, and redeemed by the executor, although capable of being recovered only in equity, shall be assets at law in the hands of the executor for the value beyond the sum paid for the redemption (^d).

(^y) *Newton v. Bennet*, 1 Bro. Ch. Rep. 137, 138. 2 Fonbl. 2d edit. 398, in note. *Vid. Harg. Co. Litt.* 113, note 2, and *Walker v. Meager*, 2 P. Wms. 552. *Nimmo, Ex'r v. The Commonwealth*, 3 Hen. & Munf. 57.

(^z) *Freemonlt v. Dedire*, 1 P. Wms. 430. *Plunket v. Penson*, 2 Atk. 290. 2 P. Wms. 416, note 2.

(^a) 2 Fonbl. 2d edit. 398, in note. 1 Bro. Ch. Rep. Append. 6. *Batson v. Lindegreen*, 2 Bro. Ch. Rep. 94. *Ship-hard v. Lutwidge*, 8 Ves. jun. 26.

(^b) *Wilson v. Fielding*, 2 Vern. 764. *Plunket v. Penson*, 2 Atk. 294. *Deg v. Deg*, 2 P. Wms. 416. *Cox's Case*, 3 P. Wms. 342. *Hartwell v. Chitters*, Ambl. 308. 3 Bac. Abr. 59, in note.

(^c) *Cox's Case*, 3 P. Wms. 342. *Hartwell v. Chitters*, Ambl. 308.

(^d) 3 Bac. Abr. 59, in note. 1 Leon. 155. *Harcourt v. Wrenham*, Moore, 858. 1 Roll. Rep. 158. *Harcourt v. Wrenham*, 1 Brownl. 76. *Plunket v. Penson*, 2 Atk. 291.

Lands may be devised to an executor to be sold by him for the payment of debts only, and then they shall be assets merely for that purpose. And so the devise may be expressed to be for payment of legacies, and not of debts; and then it shall be restricted to the former. For since the lands are not in their own nature assets, but constituted so by the will and disposition of the devisor, they shall not be assets to a greater extent than he has thought fit to direct^(e).

But in either of these cases, as I shall presently show, the assets may be marshalled.

Where money by a marriage agreement is articed to be invested in land and settled, such fund should be bound by the articles, and not be assets, either at law or in equity, for payment of debts^(f).

An estate in fee in our American plantations is subject to debts, and considered as a chattel till the creditors are satisfied, when the lands shall descend to the heir^(g).

By stat. 47 G. 3. s. 2. c. 74. it is enacted that a trader dying seised of, or entitled to, any estate, or interest in lands, tenements, hereditaments, or other real estate, which before the passing of the act would have been assets for the payment of his debts due on any specialty in which the heirs were bound, the same should be assets to be administered in courts of equity, for the payment of all the just debts of such person, as well debts due on simple contracts, as on specialty; but specialty debts are to be first paid^(h).

[417] By the stat. 5 G. 2. c. 7. § 4. it is enacted that houses, lands, negroes, and other hereditaments, and real estates situate within any of the British plantations in America belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind so-

^(e) Off. Ex. 74.

^(f) Lechmere v. Earl of Carlisle, 3 P. Wms. 217.

^(g) 11 Vin. Abr. 223. Noel v. Robinson, 2 Ventr. 358. Blankard v. Galdy, 4 Mod. 226. 4 Burn. Eccl. L. 195.

Manning v. Spooner, 3 Ves. jun. 118.

^(h) The above stat. applies only to persons who were traders at the time of their decease; and not to persons who have left off trade before they died.—Hitchon v. Bennett, 4 Madd. Rep. 180.

ever, owing by any such person to his Majesty, or any of his subjects, and shall be assets for the satisfaction thereof in like manner as real estates are liable to the satisfaction of debts due by bond, or other specialty, and shall be subject to the like remedies, proceedings, and process in any court of law or equity in any of such plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, toward the satisfaction of any such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold, or disposed of for the satisfaction of debts.

The marshalling of assets remains now to be considered.

The personal assets of the testator shall in all cases be primarily applied in discharge of his personal debts or general legacies, unless he exempt them by express words or manifest intention (ⁱ); a declaration plain, or necessary inference, tantamount to express words (^k).

[418] A devise of all the real estate, subject to the payment of debts, will not alone exonerate the personal estate; and even if the testator direct the real estate to be sold for the payment of debts, the personal estate shall be applied in exoneration of the real (^l); and it shall be thus applied, although the personal debt be secured by mortgage, and whether there be or be not

(ⁱ) 1 P. Wms. 294, note 1. Heath *v.* Heath, 2 P. Wms. 366. Walker *v.* Jackson, 1 Wils. 24 S. C. 2 Atk 624. Bridgman *v.* Dove, 3 Atk. 202. Haslewood *v.* Pope, 3 P. Wms 324 1 Bro. P. C. 192 Bunn. 302. Lord Inchiquin *v.* French, Ambl. 33. S. C. 1 Wils 82. Samwell *v.* Wake, 1 Bro. Ch. Rep. 144. Duke of Ancaster *v.* Mayer, ib. 454. Bamfield *v.* Wyndham, Prec. in Ch. 101. Wainwright *v.* Bendlowes, 2 Vern. 718. S. C. Ann. 581. Webb *v.* Jones, 2 Bro. Ch. Rep. 60. Vid. also 3 Bac. Abr. 85.

2 Fonbl. 290, note (^a). Reade *v.* Litchfield, 3 Ves. jun. 475.

(^k) Bootle *v.* Blundell, 1 Meri. Rep. 193, and 19 Vez. 494. S. C. Greene *v.* Greene, 4 Madd. Rep. 148. Gittins *v.* Steele, 1 Swans. 24. Tower *v.* Lord Rous, 18 Vez. 132. 1 Serg. & R. 453.

(^l) Fereyes *v.* Robertson, Bunn. 301. Bond *v.* Simmons, 3 Atk. 20. Haslewood *v.* Pope, 3 P. Wms. 322. 2 Eq. Ca. Abr. 493. 1 Serg. & R. 453. M'Loud *v.* Roberts & al. 4 Hen. & Munf. 443.

a bond or covenant for payment (^m). [1] So lands subject to or devised for payment of debts shall be liable to discharge such mortgaged lands either descended or devised (ⁿ), and although the mortgaged lands be devised expressly subject to the encumbrance (^o). So lands descended shall exonerate mortgaged lands devised (^p). So unencumbered lands and mortgaged lands, both being specifically devised, but expressly after payment of *all* debts, shall contribute to the discharge of the mortgage (^q): In all these cases the debt is considered as the personal debt of the testator himself, and therefore a charge on the real estate merely collateral.

But a different rule prevails where the charge is on the real estate principally, and the personal security is only collateral (^r): As where a husband on his marriage covenants to settle lands, and to raise a term of years out of them for securing portions, and also gives a bond for the performance of the covenant; for in such case the landholder enters into such covenant relying on the land to enable him to discharge it; nor does the money raised increase the personal estate, but is to exonerate the rest of his real (^s). So where the debt, although personal in its creation, was contracted originally by another (^t):

(^m) *Cope v. Cope*, 2 Salk. 449. *Howel v. Price*, 1 P. Wms. 291. *Pockley v. Pockley*, 1 Vern. 36 436. *King v. King*, 3 P. Wms. 360. *Galton v. Hancock*, 2 Atk. 436. *Robinson v. Gee*, 1 Vez. 251. 6 Bro. P. C. 520. *Philips v. Philips*, 2 Bro. Ch. Rep. 273.

(ⁿ) *Bartholomew v. May*, 1 Atk. 487. *March. of Tweedale v. Coverley*, 1 Bro. Ch. Rep. 240.

(^o) *Serle v. St. Eloy*, 2 P. Wms. 386. (^p) *Galton v. Hancock*, 2 Atk. 424.

(^q) *Carter v. Barnardiston*, 1 P. Wms. 505. 2 Bro. P. C. 1. (^r) *Edwards v. Freeman*, 2 P. Wms. 437. 664, in note. *Ward v. Lord Dudley and Ward*, 2 Bro. Ch. Rep. 316. *Leman v. Newnham*, 1 Vez. 51. *Lewis v. Mangle*, Ambl. 150.

(^s) 2 Fonbl. 292, note b. *Edwards v. Freeman*, 2 P. Wms. 435.

(^t) *Cope v. Cope*, 2 Salk 449. *Bagot v. Oughton*, 1 P. Wms. 347. *Leman v. Newnham*, 1 Vez. 51. *Robinson v.*

[1] Personal estate shall not go, in case of mortgaged premises, so far as to defeat specific or ascertained pecuniary legacies; an *heres factus* stands in this respect on the same footing with an *heres natus*. *Ruston v. Ruston*, 2 Dall. 243. S. C. 2 Yeates, 54. Otherwise as to residuary legatees. *Ibid.*

As where an estate is bought subject to a mortgage, the personal estate of the purchaser shall not be applied in exoneration of the real estate, unless he appeared to have intended to make the debt his own^(u); but a mere covenant for securing the debt will not be sufficient for that purpose^(v).

With respect to the priority of the application of real assets, when the personal estate is either exempt or exhausted, it seems, that first the real estate expressly devised for the purpose shall be applied; secondly, to the extent of the specialty debts, the [420] real estate descended; 3dly, the real estate specifically devised subject to a general charge of debts^(w).

As it is the object of a court of equity, that every claimant on the assets of the deceased shall be satisfied, so far as that purpose can be effected by any arrangement consistent with the nature of the respective claims of creditors, it has been long settled, that where A, a creditor, has more than one fund to resort to, and B, another creditor, only one, A shall resort to that fund on which B has no lien^(x). If therefore a specialty creditor whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of such specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt^(y).

The same marshalling of assets may also take place in favour of legatees. As against assets descended, they shall have the

Gee, ib. 251. Lacam *v.* Mertins, ib. 312. Parsons *v.* Freeman, Ambl. 115.

2 P. Wms. 664, in note. Lawson *v.* Hudson, 1 Bro. Ch. Rep. 58. Earl of Tankerville *v.* Fawcet, 2 Bro. Ch. Rep. 57. Tweddle *v.* Tweddle, ib. 101. 152. Billinghurst *v.* Walker, ib. 604.

(u) 2 Fonbl. 202, note b. Pockley *v.* Pockley, 1 Vern. 36. 6 Bro. P.C. 520. Billinghurst *v.* Walker, 2 Bro. Ch. Rep. 608.

(v) Bagot *v.* Oughton, 1 P. Wms. 347. Evelyn *v.* Evelyn, 2 P. Wms. 664. Forrester *v.* Lord Leigh, Ambl. 171. Earl of Tankerville *v.* Fawcet, 2 Bro. Ch. Rep. 58. Tweddell *v.* Tweddell,

ib. 152. Billinghurst *v.* Walker, ib. 604.

(w) 1 P. Wms. 294, note 1. Galton *v.* Hancock, 2 Atk. 424. Doune *v.* Lewis, 2 Bro. Ch. Rep. 257. 261, in note. 259, in note. Manning *v.* Spooner, 3 Ves. jun. 117.

(x) 1 P. Wms. 679, note 1. Lanoy *v.* Duke of Athol, 2 Atk. 446. Lacam *v.* Mertins, 1 Ves. 312. Mogg *v.* Hodges, 2 Ves. 53.

(y) 2 Ch. Ca. 4. Sagittary *v.* Hyde, 1 Vern. 455. 1 Eq. Ca. Abr. 144. Wilson *v.* Fielding, 2 Vern. 763. Galton *v.* Hancock, 2 Atk. 436. 3 Wooddes. 489.

same equity: Thus where lands are subjected to the payment of all debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of the personal assets^(z). [421] So, where legacies by the will are charged on the real estate, but not the legacies by the codicil; the former shall resort to the real assets on a deficiency of such as are personal to pay the whole^(a). So, although a specialty creditor may elect to have his debt out of the hands of the heir or of the devisee, yet, as we have seen, the heir or devisee shall in such case stand in the place of such creditor, and reimburse himself out of the personal estate^(b). [2]

(z) *Haslewood v. Pope*, 3 P. Wms. 523. *Iey, 2 P. Wms. 620.*

(a) *3 Ch. Rep. 83. Masters v. Masters*, 1 P. Wms. 422. *Bligh v. Earl of Darn-*

(b) Clifton v. Burt, 1 P. Wms. 680.

[2] If a testator blend his real and personal estate in a general devise of the residue, the legacies are a charge upon the lands. *Witman v. Norton*, 6 Binn. 395.

A will began as follows: "It is my will that my just debts and funeral expenses be fully paid and satisfied by my executors." The testator then bequeathed a legacy to A, "to be paid her on the day of her marriage or arrival at lawful age, and meanwhile to be placed out at interest, *from one year after my decease*," another legacy to B, "to be paid her one year after my decease," and devised certain real estate to C, and a legacy of 100*l.* to be paid at lawful age; but in case of his death unmarried, the devise and legacy to be void, "and the whole to sink into my residuary estate;" concluding, "the rest and personal, whatsoever and wheresoever, I give to my brothers and sisters, their heirs and assigns, as tenants in common; provided always that my sister M keep the whole in her possession during her widowhood." Held, that the testator having blended his real and personal estate, the real estate was subjected to the burthen of the legacies, on a deficiency of personal estate. *Tucker v. Hassencleaver & al.* 3 Yeates, 294. 2 Binn. Append. 525.

A, being seised of a tract of land, and having no personal estate, bequeathed several pecuniary legacies, and gave "all the rest and residue of his estate, real and personal," to his son B, whom he appointed executor. The legacies are a charge upon the land, and B takes nothing but what remains after the payment of the legacies. *Nichols v. Postlethwaite*, 2 Dall. 131.

On a deficiency of personal assets to pay debts and legacies, the balance of the legacies is payable out of the real estate, before the residuary devisees can take. *Case of Oakford's Est.* Orphan's Court, Philada. Dec. 1820. MS. Wharton's Digest, 614 pl. 137.

In New York, if the whole real estate be sold by order of the surrogate, the money becomes equitable assets, and is to be distributed *pari passu*, and not according to the rule of the common law. *Tuppen v. Kain*, 12 Johns. Rep. 120.

But the principles of these rules will not admit of their being applied in aid of one claimant, so as to defeat another. And, therefore, a pecuniary legatee shall not stand in the place of a specialty creditor, as against lands devised, though he shall as against lands descended^(e). Yet such legatee shall stand in the place of a mortgagee, who has exhausted the personal assets, to be satisfied out of the mortgaged premises, though specifically devised^(d); for the application of the personal assets in case of the real estate mortgaged^(e), does not take place to the defeating of any legacy, either specific or pecuniary^(f). A legatee shall also stand in the place of a specialty creditor, who has exhausted the personality, as against a residuary devisee of the real and personal estate, because he has only the rest and residue^(g).

Nor do any of the rules above mentioned subject any fund to a claim, to which it was not before liable, but only provide that the election of one claimant shall not prejudice the claims of the [422] others^(h). Thus, where A, seised of freehold and copyhold lands, mortgaged them in his lifetime, and died indebted by mortgage, and on several bonds, the specialty creditors urged the court in marshalling the assets to cast the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate: yet the court held, that as copyhold estates were not liable, either at law or in equity, to the testator's debts, farther than he subjected them to the same, the copyhold estate should bear its proportion with the freehold estate for payment of the mortgage, but should not be liable to make satisfaction for the specialty debts⁽ⁱ⁾. But this case, as being quite anomalous and irreconcilable with all principle, has been lately overruled^(k).

(e) *Herne v. Meyrick*, 1 P. Wms. 201. *Clifton v. Burt*, 678. *Haslewood v. Pope*, 3 P. Wms. 324.

(d) *Lutkins v. Leigh*, Ca. Temp. Talb. 53. *Forrester v. Lord Leigh*, Ambl. 171.

(e) *Vid. Howel v. Price*, 1 P. Wms. 294.

(f) *Oneal v. Mead*, 1 P. Wms. 693. *Tipping v. Tipping*, ib. 730. *Davis v.*

Gardiner, 2 P. Wms. 190. *Rider v. Wager*, 335.

(g) *Handby v. Roberts*, Ambl. 129.

(h) *Galton v. Hancock*, 2 Atk. 438. *Lacam v. Mertins*, 1 Vez. 312.

(i) *Robinson v. Tonge*, cited 1 P. Wms. 679, note 1, and *vid. supr.* 411. and 2 Ves. 271.

(k) *Aldrich v. Cooper*, 8 Ves. jun. 382. See also *Trimmer v. Bayne*, 9 Ves.

Where a testator, having both freehold and copyhold estates, charges *all his real estate* with payment of his debts, if he has surrendered the copyhold to the use of his will, the freehold and copyhold shall be applied rateably; but if he has *not* surrendered the copyhold, it shall not be applied until the freehold is exhausted⁽¹⁾.

If a legacy be given out of a mixed fund of real and personal estate, payable at a future day, and the legatee die before the day of payment, it is doubtful whether the court will marshal the assets, so as to turn such legacy on the personal estate: in which case it would be vested and transmissible; but, as against the real estate, it would sink by the death of the legatee^(m).

As against real assets descended, the wife shall stand in the place of specialty creditors for the amount of her paraphernalia^[423] (ⁿ); but, whether she shall be so entitled as against real assets devised, seems to be a point unsettled^(o), excepting in the case of a real estate charged with payment of debts in aid of the personal estate, in which the court decreed her paraphernalia to the wife, in prejudice of the charged estate^(p).

A court of equity will not marshal assets in favour of a charitable bequest, so as to give it effect, out of the personal chattels, it being void so far as it touches any interest in land^(q).

Under a devise of real and personal estate in trust to pay debts and legacies, some of which were void under the stat. 9 *Geo. 2. c. 36.* as a charge of charity legacies upon the real and leasehold estates and money on mortgage; on a deficiency of assets the other legatees were preferred to the heir^(r).

jun. 209. And in *Tomlinson v. Ladbrooke*, at the Roll's sittings after Hil. T. 1809. Sir Wm. Grant, M.R. held clearly that the assets should be marshalled as against a copyhold estate.

(¹) *Growcock v. Smith*, 2 Cox's Rep. 397.

(^m) *Prowse v. Abingdon*, 1 Atk. 482. and *Pearce v. Taylor*, before Lord Thurlow, C. Trin. Vac. 1790. cited 1 P. Wms. 679, note 1.

(ⁿ) *Tipping v. Tipping*, 1 P. Wms. 729. *Snelson v. Corbet*, 3 Atk. 369. *Graham v. Londonderry*, ib. 393.

(^o) 2 P. Wms. 554, note 1. *Probert v. Clifford*, Ambl. 6. *Inclendon v. Northcote*, 3 Atk 438. 3 Bac. Abr. 87. *Ld. Townshend v. Windham*, 2 Vez. 7. Vid. supr. 231.

(^p) *Boyntun v. Boyntun*, 1 Cox's Rep. 106.

(^q) *Mogg v. Hodges*, 2 Vez. 52. *Attorney-General v. Tyndall*, Ambl. 614. *Foster v. Blagden*, ib. 704. *Hillyard v. Taylor*, ib. 713. 3 Wooddes. 489. note (^r). *Mogg v. Hodges*, 1 Cox's Rep. 7. and other cases in the same work.

(^r) *Currie v. Pye*, 17 Ves. jun. 462.

CHAP. IX.

OF A DEVASTAVIT.

HAVING thus discussed what belongs to the discharge of an executor's duty, I am now to consider, what shall amount to such a violation or neglect of it as shall make him personally responsible.

This species of misconduct is styled in law a *devastavit*; that is, a wasting of the assets^(a).

And where an executrix in respect of her receipts as such, was considerably indebted to the estate, an annuity to which she was entitled under the will, was ordered, as it became due, to be applied in payment of such debt, and her solicitor was declared to have a lien for his taxed costs, upon any payment of the annuity to which she might be entitled, after payment of what was due to the estate^(b).

An executor may incur this charge in a variety of modes, not only by plain and palpable acts of abuse, as giving away, embezzling, or consuming the property, without regard to debts or legacies; but also by misapplying it in extravagant expenses in the funeral^(c); in the payment of debts out of their legal order, to the prejudice of such as are superior; or by an assent to, or payment of a legacy, when there is not a fund sufficient for creditors^(d).

So if the executor release or cancel a bond due to the testator, or deliver it to the obligor, this shall charge him to the amount of the debt, whether in point of fact he received it or not^(e). If he release a cause of action accrued in right of the testator, whether before or subsequently to the testator's death, this also will, generally speaking^(f), be a *devastavit*^(g).

(^a) Off. Ex. 157. 3 Bac. Abr. 77. Com. Dig. Admon. I. 1. 11 Vin. Abr. 306.

(^b) Skinner v. Sweet, 3 Madd. Rep. 244.

(^c) Vid. supr. 246.

(^d) Off. Ex. 158.

(^e) Ibid. 159. 1 Nels. Abr. 262.

(^f) Sed vid. infr. 429.

(^g) Off. Ex. 71. 159. Chandler v. Thompson, Hob. 266. And. 138.

Brightman v. Knightley, Cro. Eliz. 43. *The People v. Pleas*, 2 Johns. Cas. 376. *De Diemar v. Van Wagenen*, 7 Johns. Rep. 404. *Dawes, &c. v. Boylston*, 11 Mass. T. R. 337.

If he submit to arbitration a debt, or any other demand he may be entitled to in right of the testator, and the arbitrator do not award him a recompense to the full value, this, as being his own voluntary act, shall bind him to answer the difference^(h). If an executor take an obligation in his own name for a debt due by simple contract to the testator, he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right, and is *quasi* a payment⁽ⁱ⁾. If, in the character of an executor, he commence an action in which he has a right to recover, and afterwards agree with the defendant to receive a specific sum at a future day as a compensation, and the party fail to pay it, the executor, in that case, is liable on a *devastavit* for the value^(k). Thus, where the executor of an obligee took in payment a bill of exchange drawn on a banker for the money, who accepted the bill, and before payment failed; on the executor's afterwards bringing an action on the bond, and this matter [426] being disclosed in evidence, it was held to be a payment^(l). So, if an executor pay money in discharge of an usurious bond, or any other usurious contract entered into by the testator, it shall involve him in the same consequences^(m).

Such acts also of negligence and careless administration as tend to defeat the rights of creditors, or legatees, fall under the same denomination. As if the executor delay the payment of a debt payable on demand with interest, and suffer judgment for principal and interest incurred after the testator's death; unless he can show that the assets were insufficient to discharge the debt immediately⁽ⁿ⁾, he shall be held guilty of a *devastavit*.

If the executor lose any of the testator's chattels, he shall be responsible for their value^(o). And in a case where the ex-

^(h) Off. Ex. 71. 159, 160. Anon. 3 Leon. 51.

⁽ⁱ⁾ Goring v. Goring, Yelv. 10. Norden v. Levit, 2 Lev. 189. Keilw. 52.

^(k) Norden v. Levit, 2 Lev. 189. 2 Jon. 88. S. C. Barker v. Talcot, 1 Vern. 474.

^(l) 3 Bac. Abr. 78. in note. Et vid. 1 Vern. 474.

^(m) Winchcombe v. Bp. of Winchester, Hob. 167. Noy. 129.

⁽ⁿ⁾ Seaman v. Everad, 2 Lev. 40. and see Hall v. Hallet, 1 Cox's Rep. 134.

^(o) Vid. Goodfellow v. Burchett, 2 Vern. 299. *But otherwise, if robbed.* Furman v. Coe & al. 1 Caine's Cas. 96.

cutor had lost a bond due to the testator, the Court of Chancery was inclined to charge him with the debt: but directed only, that he should prosecute a suit instituted by him against the obligor, with effect, in order to recover the money on the bond, and respite judgment in the meantime^(p). If the executor apply merely by an attorney to the obligor of a bond to pay the debt, but bring no action, he shall be charged with the [427] amount of it^(q). He shall, in like manner, be personally answerable, if, by delaying to commence an action, he has enabled a creditor of a testator to avail himself of the statute of limitations.^(r).

If an executor appoint an agent to collect the testator's effects, and the agent embezzle them, it shall be a *devastavit* by the executor^(s). If a term be assigned by an executor in trust, to attend an inheritance, it shall in equity follow all the estates created out of such inheritance, and all the incumbrances subsisting upon it^(t); but as by such assignment the term ceases to be assets at law, the executor shall be responsible to the creditors for a *devastavit*^(u). If an executor retain money in his hands for any length of time, which by application to the Court of Chancery, or by vesting in the funds, he might have made productive, he shall be charged with interest upon it^(w). If he permit rent to run in arrear, and it is lost through his negligence, he will be charged with the amount so lost^(x).

If he lay out the assets on private securities, all the benefit made thereby shall accrue to the estate, yet the executor shall answer all the deficiency^(y).

And where an executor sold houses and applied part of the money in payment of debts, &c. and paid the rest into his bank-

(p) *Ibid.*

(w) 2 Fonbl. 2d edit. 184, note p.

(q) 3 Bac. Abr. 60. *Lowson v. Cope-land*, 2 Bro. Ch. Rep. 156.

Bird *v. Lockey*, 2 Vern. 744. *Perkins v. Baynton*, 1 Bro. Ch. Rep. 375.

(r) *Hayward v. Kinsey*, 12 Mod. 573. 11 Vin. Abr. 309.

Littlehales v. Gascoyne, 3 Bro. Ch. Rep. 73. *Franklin v. Frith*, 433, et vid.

(s) *Jenkins v. Plombe*, 6 Mod. 93.

ibid. 107.

(t) *Supr. 410.*

(x) *Tebbs v. Carpenter*, 1 Madd. Rep.

(u) *Charlton v. Lowe*, 3 P. Wms. 330.

290.

Willoughby v. Willoughby, 1 Term Rep. 763.

(y) *Adye v. Feuilleteau*, 1 Cox's Rep. 24.

ers, mixing it with his own money, instead of vesting the same in stock as directed by the will, and the bankers failed, he was held liable to pay the money to the legatees^(z).

If an executor sell the testator's goods at an undervalue, although it be an appraised value^(a); or if he delay disposing of them, by which they are injured, he is personally bound to make a compensation^(b). If he omit to sell the goods at their full price, and afterwards they are taken out of his hands, [428] he shall be liable to the extent of the value of the goods, and not merely to what he recovers in damages; for there was a default on his part^(c). But if, without any imputation on him, the goods are taken out of his possession, although he recover not such damages as the goods were really worth, he shall be responsible for no more than he recovers^(d). If the goods be perishable, and on his part there has been neither neglect in keeping them, nor delay in selling them; in case they are impaired, he shall not answer for their first value, but only for what they were worth at the time of the sale. Yet, if the goods be taken out of his possession, he must sue the party taking them, that he may exempt himself from any greater claim than the damages he shall recover^(e).

In case of an executor's investing money in the funds, and appropriating the same, he shall not be answerable for a loss by the fall of stocks^(f). Nor, as it seems, shall he be so liable, although, without the indemnity of a decree, he lend money on a real security, which at the time there was no reason to suspect^(g). It has been held that trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust^(h). But it has since been decided that an executor cannot lend money on personal security, though words which may imply a discretion so to do are used by the testator

^(z) Fletcher *v.* Walker, 3 Madd. Rep. 73.

^(a) Off. Ex. 158.

^(b) Jenkins *v.* Plombe, 6 Mod. 181, 182.

^(c) Ibid.

^(d) Jenkins *v.* Plombe, 6 Mod. 181, 182.

^(e) Ibid.

^(f) 2 Fonbl. 2d edit. 184, note p. Hutchinson *v.* Hammond, 3 Bro Ch. Rep. 147. Franklin *v.* Frith, ib 433.

Vid. also Cooper *v.* Douglas, 2 Bro. Ch. Rep. 231.

^(g) Brown *v.* Litton, 1 P. Wms. 141.

^(h) Hafden *v.* Parsons, 1 Eden's Rep. 145.

in his will⁽ⁱ⁾. Nor will a power to lend money upon real or personal security, enable trustees to accommodate a trader with a loan upon his bond^(k). An executor has an honest discretion to call in a debt bearing interest, if he conceive it to be [429] in hazard^(l). If an executor merely give a receipt for so much due on a bond as he in fact receives, he shall not be charged with a *devastavit* for the residue^(m). Nor is a conversion of the goods of the testator to his own use a *devastavit*, if he pay debts of the testator to the value with his own money⁽ⁿ⁾. Nor is he so liable if he pay a debt of an inferior nature out of his own purse to the amount of the testator's effects in his hands; for they remain equally liable to the claim of the superior creditor, and may equally be seized at his suit in execution in specie, as the testator's property^(o). Nor, if the executor compound an action of trover for the goods of the testator, and take a bond for the money payable at a future day, does that act necessarily amount to a *devastavit*, as the money, for which the bond is taken, is assets immediately^(p). But he shall be charged, as we have seen^(q), in case there be a failure in the payment of it. If there be arrears of rent on a lease, and on the tenant's becoming insolvent, the executor release the arrears, and give him a sum of money to quit possession; in case he appear thus to have acted for the benefit of the estate, he shall be allowed both^(r). Nor is an executor, as we have seen^(s), bound to plead the statute of limitations to an action commenced against him by a creditor of the testator. [1]

(i) *Wilkes v. Steward*, Coop. Rep. 6. and 2 Cox's Rep. 1.

(m) Com. Dig. Admon. I. 2. Off. Ex. 159.

(k) *Langston v. Ollivant*, Coop. Rep. 33.

(n) *Merchant v. Driver*, 1 Saund. 307. Vid. supr. 238.

(l) 2 Fonbl. 2d edit. 186, note q. *Newton v. Bennet*, 1 Bro. Ch. Rep. 361. Sed vid. Anon. Mosel. 98. *M'Call v. Beachy's Adm.* 3 Munf. Rep. 288.

(o) *Wheatly v. Lane*, 1 Saund. 218.

(p) *Norden v. Levit*, 2 Lev. 189.

(q) Supra, 425.

(r) *Blue v. Marshall*, 3 P. Wms. 381. Vid. supr. 343.

[1] It is the duty of an administrator to object to claims against the estate, which cannot be recovered by law; and if he wilfully neglect his duty in this particular, it is unfaithful administration; and the heir, or any other person injured, may have a remedy against him upon his bond, or a special action on the case. *Parsons v. Mills & al.* 1 Mass. T. R. 431.

If an executor become bankrupt, having wasted the assets, the *devastavit* may be proved under the commission (^c). Where a specific legacy was given to an executor, who afterwards became bankrupt and committed a *devastavit*, and the subject of the specific bequest was sold by his assignees, it was held, that the produce in their hands was not specifically liable to make good the *devastavit*, in favour of the parties beneficially entitled under the will, but that such parties were only entitled to prove under the commission to the amount of the *devastavit* (^v).

[430] If the husband of an executrix commit a *devastavit*, in case the executorship commenced before the marriage, they shall both be chargeable. If it commenced subsequently to the marriage, the husband is liable alone. If an executrix commit a *devastavit*, and afterwards marry, the husband, we have seen, as well as the wife, is responsible during the coverture (^u).

A *devastavit* by one executor shall not charge his companion (^w); and if there be several executors or administrators, each shall be liable only for what he receives (^x), provided he hath not intentionally or otherwise contributed to the *devastavit* of the other (^y).

But an executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of *plenè administravit* to an action by a bond-creditor of his testator, by showing that he paid the money over to his co-executor, even for the purpose of satisfying the bond-creditor who had applied for payment of such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt (^z).

Formerly, the executor of an executor could not be charged by a *devastavit* committed by the first executor, although to the prejudice of the king, for it was held to be a *tort* (^a), and, therefore, to die with the party. But, by the stat. 4 & 5 W. &

(^c) Whitmarsh's B. L. 2d edit. 269.

3 Bro. Ch. Rep. 74. and vid. infr.

(^v) Geary v. Beaumont, 3 Meriv. 431.

(^x) Barnes, 440.

(^u) Beynon v. Gollins, 2 Bro. Ch. Rep.

(^y) Vid. infr.

323. Vid. supr. 358, 359.

(^z) Crosse v. Smith, 7 East. 246.

(^w) Off. Ex. 161, 162. Dyer, 210. 3

(^a) Tucke's Case, 3 Leon. 241. Bey-

Bac. Abr. 31. Littlehales v. Gascoyne,

324.

M. c. 24. s. 12. an executor of an executor shall be liable on a *devastavit* committed by his testator, in the same manner as he would have been if living. [2]

[2] A former judgment by default, and a *fieri facias* returned *nulla bona*, are conclusive evidence of a *devastavit*. *Platt v. Smith's Adm'rs.* 1 Johns. Cas. 276. The executor must defend himself in the first suit, or he will be precluded from alleging that he had not assets: *Ibid.*

So, where there is a verdict for the plaintiff, on the plea of *plene administravit*, the judgment, for all but the costs, is *de bonis testatoris*. If on such judgment a *fi. fa.* issue, and no goods of the testator are shown, the sheriff must return a *devastavit*, which the defendant will be estopped by the verdict from denying. 4 Serg. & R. 396.

A judgment against an executor or administrator as such, with a return on the execution "that he has removed out of the state," is not a sufficient evidence of a *devastavit* to ground an action on his bond against himself and sureties. *Turner, &c. v. Clinn, &c.* 1 Hen. & Munf. 33. And a second suit must be brought to establish a *devastavit*, before a suit can be brought on the administration bond. *Gordon's Adm. v. The Justices of Frederic,* 1 Munf. Rep. 1.

But a judgment against an executor or administrator *as such*, a *fieri facias*, and a return of *nulla bona*, will warrant an action against him alone, on his administration bond, without any previous suit suggesting a *devastavit*. *Ibid.*

Expenses unnecessarily and imprudently incurred, by an executor or administrator, in prosecuting or defending lawsuits, ought not to be charged against the estate. *Drinkwater v. Drinkwater,* 6 Mass. T. R. 620.

After confessing judgment in an action for a *devastavit*, an executor cannot resort to a court of equity, on the ground of his having fully administered. *Worsham v. M'Kensie,* 1 Hen. & Munf. 342.

CHAP. X.

OF REMEDIES FOR AND AGAINST EXECUTORS AND ADMINISTRATORS, AT LAW AND IN EQUITY.

SECT. I.

Of remedies for executors and administrators at law.

BEFORE I conclude, it will be necessary to consider, first, what remedies, either at law or in equity, executors or administrators are entitled to, in right of the deceased; and then, secondly, what remedies may be had against them.

In regard to the first of these points, the subject has been in a great measure anticipated by the discussion of the executor's interest in the testator's *choses in action* (^a), the existence of which necessarily supposes a remedy to give it effect.

From what has been already stated it appears, that the executor represents the testator in respect to all his personal contracts: therefore he may maintain such actions to enforce them as might have been maintained by the testator himself (^b). [432] Thus an executor may have an action on a debt due to the testator by judgment, statute, recognizance, obligation, or other specialty (^c). So he is entitled to an action of debt suggesting a *devastavit* in the lifetime of his testator, on a judgment recovered by such testator against an executor (^d). So the executor of the assignee of a bail-bond shall have an action upon it (^e). So an executor may maintain an action on a bond, though conditioned for the performance of an award (^f). He may also have an action on a covenant entered into with the testator to perform a personal thing (^g); and even on a co-

(^a) *Vid. supr.* 157.

(^b) 3 Bac. Abr. 59 91. Countess of Rutland *v.* Rutland, Cro. Eliz. 377. Latch. 167. Roll. Abr. 912. Off. Ex.

65.

(^c) Com. Dig. Admon. B. 13. *Wooster v. Bishop*, 2 Root's Rep. 230.

(^d) *Berwick v. Andrews*, 1 Salk. 314. Mod. Ca. 126. S. C. Ld. Raym. 971. 1502. *Vid. Erving v. Peters*, 3 Term Rep. 685.

(^e) Fort. 367.

(^f) 2 Ventr. 349.

(^g) Latch. 168.

tenant that touches the realty, as for assuring lands, if it were broken in the testator's lifetime; and in such cases damages shall be recovered by the executor, although he be not expressly named^(b); for since the testator was entitled to an action of covenant for such breach, and to recover damages as the principal remedy, and not merely accessory, the law devolves such remedy on the executor; but if waste be committed by the lessee in the lifetime of the lessor, after his death his heir can have no action for the waste, because he cannot recover treble damages; nor can the [433] executor have it, for he has no right to recover the place wasted, the inheritance of which has descended to the heir⁽ⁱ⁾. [1]

The executor may also, in the right of the testator, maintain an action on simple contracts, in writing, or not in writing, either express or implied^(k); and even on contracts for the benefit of a third person^(l). He may likewise have an action for a relief due to the testator^(m). And pursuant to the stat. 13 Ed. 1. West. 2. c. 23. an executor is entitled to an action of account on an account with his testator⁽ⁿ⁾; but this species of remedy in the courts of law has fallen into disuse. He may also, by the express provision of the stat. 4 Ed. 3. c. 7, have an action of trespass

(b) Com. Dig. Admon. B. 13. Covenant. B. 1. 3 Bac Abr. 91. Lucy v. Lexington, 2 Lev. 26 S. C. Ventr. 175. Off. Ex. 65.

(i) Off. Ex. 65. Com. Dig. Wast. C. 3. 2 Inst. 305.

(k) Com. Dig. Admon. B 13. 3 Bac. Abr. 59. 92. Petrie v. Hannay, 3 Term Rep. 660.

(l) Al. 1.

(m) Noy. 43. Ld. St. John v. Brandring, Cro. Eliz. 883.

(n) Com. Dig. Admon. B. 13.

[1] Where R granted and demised land to P, and to his heirs, executors, and administrators, for ever, reserving an annual rent, which P, for himself, his heirs, executors, and administrators, covenanted to pay on the first day of May in each year, it was held, that the executors of R could recover from the executors of P, rent which accrued subsequently to the death of P, though the estate descended to the heir, and the executors or personal estate received no benefit from it. The liability rests on the ground of the express covenant. *Van Renssalaer's Ex'rs. v. Platner's Ex'rs.* 2 Johns. Cas. 17.

But the executors of R cannot, in such case, recover for rent due after the death of R, the estate being in fee. *Ibid.*

So an action of covenant may be obtained for rent accruing before the death of R, against the executors of P, though the land had passed by the act of law out of the hands of the lessee. *Ibid.*

for the taking of the testator's goods : and although the statute speak only of the carrying away of goods, yet its operation is not confined to that specific trespass, which is named merely for an example ; but it has been held, as we have seen^(o), to comprehend other injuries to the testator's personal estate^(p) : therefore on this statute, an action will lie for trespass with cattle on his leasehold premises^(q) ; or for cutting corn, though growing on his freehold lands, and carrying it away at the [434] same time^(r). [2] So by the like equity of this statute an executor may maintain an action of trover for the conversion of the testator's goods in his lifetime^(s) ; or an action of debt on the stat. 2 & 3 Ed. 6. c. 13. for not setting out tithes due to the testator^(t) ; or a *quare impedit*, in case he died within six months after the usurpation^(u) ; and, it seems, that under this statute an executor may maintain ejectment for an *ouster* of the testator, although he were seised in fee, because in such case the executor may proceed in that form of action for damages only^(w), in the same manner as a lessee where the lease expires pending the suit^(x).

By the common law an executor is entitled to an action of

^(o) Supr. 158.

^(p) Com. Dig. Admon. B. 13. Semb. Latch. 168.

^(q) Off. Ex. 67, 68.

^(r) Emerson v. Emerson, 1 Ventr. 187.

^(s) Harris v. Vandridge, Moore, 400. Countess of Rutland v. Rutland, Cro. Eliz. 377. Latch. 168. 1 Anders. 242. Russell's Case, 1 Leon. 193, 194. Moreron's Case, 1 Ventr. 30. *Towle v. Lovett*, 6 Mass. T. R. 294.

^(t) Holl v. Bradford, 1 Sid. 88. Morton v. Hopkins, 407. Williams v. Cary, 4 Mod. 404. Eves v. Mocats, 1 Salk. 314. Moreron's Case, 1 Ventr. 30. 3 Bac. Abr. 91, in note.

^(u) Off. Ex. 66, 67. Sav. 94. Latch. 168. Noy. 87. Poph. 189. 4 Leon. 15.

^(w) 3 Bac. Abr. 92. Moreron's Case, 1 Ventr. 30. Doe v. Potter, 3 Term Rep. 13.

^(x) Doe v. Potter, 3 Term Rep. 16. arguendo. Co. Litt. 285. Stra. 1056.

[2] The stat. 4 Edw. 3. c. 7. is re-enacted in Vermont ; and power is given to the executor or administrator to commence and maintain trespass *quare clausum fregit*, or ejectment, or any other proper action, to recover seizin or possession of any houses, lands, tenements, &c. on the right of the testator or intestate ; or to prosecute any such action commenced by his testator or intestate, to the use of the devisee, heir, or creditor, as the case may be.

replevin for goods distrained in the testator's lifetime^(y); or to an action of detinue for any specific chattel; or to bring ejectment to recover land held for a term of years; for in those instances the thing itself is the object of the action, and the property continues in the plaintiff^(z).

[435] He may likewise avow for rent in arrear at the testator's death, as incident to a reversion for years, which devolved upon him as executor^(a).

An executor shall also have an action against a sheriff for the escape of a party in execution on a judgment obtained by the testator, even where the escape happened in the testator's lifetime^(b). So he may have an action against the sheriff for not returning his writ, and paying money levied on a *fieri facias*^(c), or for a false return, stating that he had not levied the debt, when in truth he had^(d). So the executor of a landlord may maintain an action against an officer for removing goods taken in execution before the payment of a year's rent^(e). So in the character of an executor he may have a writ of error^(f). And it has been held, that he may have such writ to reverse the testator's attainer of high treason, inasmuch as the executor is privy to the judgment, and may be damned by it; but, on the other hand, it has been insisted, that though the reversal restore the blood and land, it is of no avail to the executor, since the goods are forfeited by the conviction, and [436] not by the attainer^(g). An executor is likewise entitled to remedies by action of deceit, by *audita querela*, or *identitate nominis*^(h).

(y) Arundell *v.* Trevill, 1 Sid. 82. Latch. 163. Off. Ex. 65. Gilb. L. of Distr. 3d edit. 156.

(z) Latch. 168. Off. Ex. 65.

(a) Com. Dig. Distress, A. 2. 1 Roll. Abr. 672. Wankford *v.* Wankford, 1 Salk. 392. 397. Duncomb *v.* Walter, 2 Show. 254. Van Renssalaer *v.* Platner, 2 Johns. Cas. 17.

(b) Com. Dig. Admon. B. 13. Spurstow *v.* Prince, Cro. Car. 297. Dyer, 322. V d. Berwick *v.* Andrews, Ld. Raym. 973.

(c) 1 Roll. Abr. 913. Spurstow *v.* Prince, Cro. Car. 297.

(d) Williams *v.* Cary, 4 Mod. 404. S. C. 1 Salk. 12. Comb. S. C. 392, 323 S. C. 1 Ld. Raym. 40. 3 Bac. Abr. 98.

(e) Palgrave *v.* Windham, Stra. 202.

(f) Latch. 167.

(g) King *v.* Aylott, 2 Salk. 295 pl. 1. Vid. 4 Bl. Com. 387.

(h) Latch. 167. Off. Ex. 71. 3 Bac. Abr. 60.

He may also sue in that character in a court of conscience (ⁱ).

And by the stat. 11 Geo. 2. c. 19. s. 15. above referred to (^k), an executor of tenant for life, on whose death any lease determined, shall in an action on the case recover of the lessee a just proportion of rent from the last day of payment to the death of such lessor.

But an executor has no right to an action for an injury to the person of the testator; as for a battery, imprisonment, or the like (^l): nor for a breach of promise of marriage, where no special damage is alleged (^m): nor for a prejudice to his freehold; as for felling his wood, or cutting and carrying away his grass; for wood and grass growing are parcel of the freehold (ⁿ), and consequently in such case the heir, and not the executor, is the party injured. Yet, if the lord of a manor assess a fine on a copyholder for his admittance, and die, his executor may bring an action for it; for it does not depend on the inheritance, but is like a fruit fallen (^o).

[437] The executor may also in right of the testator maintain actions, the cause of which accrued after the testator's death (^p); as in case a bond given to the testator be forfeited after that event (^q); or a personal covenant entered into with the testator be broken (^r); or a debt on any other species of contract made with him become payable (^s); or his goods be taken (^t); or trespass committed on his leasehold premises (^u); in all these, and

(ⁱ) Dougl. 246.

(^p) Com. Dig. Pleader, 2 D. 1. Anon.

(^k) Supr. 208.

3 Leon. 212.

(^l) Com. Dig. Admon. B. 18. Latch. 168, 169. 1 Anders. 243. Le Mason v. Dixon, Jon. 174.

(^q) 3 Bac. Abr. 93. 1 Roll. Abr. 602.

(^m) Chamberlain v. Williamson, 2 Mau. & Sel. 408

(^r) Off. Ex. 82. 11 Vin. Abr. 231.

(ⁿ) Emerson v. Emerson, 1 Ventr. 187. Le Mason v. Dixon, Jon. 174. Off. Ex. 67, 68. Beeston's Ex'rs. v. Dorsey, 1 Har. & M'Hen. 224.

L. of Ni. Pri. 158.

(^o) 3 Bac. Abr. 92. Le Mason v. Dixon, Carth. 90. Shuttleworth v. Garnet, 3 Mod. 239. S. C. 3 Lev. 261. S. C.

(^s) King v. Stevenson, 1 Term Rep. 487. Munt v. Stokes, 4 Term Rep. 565. Com. Dig. Pleader, 2 D. 1. 3

Comb. 151. S. C. Show. 35. Evelyn v. Chichester, 3 Burr. 1717. accord.

Bac. Abr. 94. Reg. 140. 5 Co. 31 b.

Smith v. Norfolk, Cro. Car. 225. Frevin v. Paynton, 1 Lev. 250.

(^t) 4 Bac. Abr. 93, in note. 94. 1 Roll. Abr. 602. Lane, 80. Jenkins v. Plombe, 6 Mod. 92.

(^u) Com. Dig. Admon. B. 15. Off. Ex. 70.

the like instances, the executor, in his representative capacity, is entitled to a remedy by action.

So, if the testator died possessed of a term for years in an advowson, it vests, as we have seen^(w), in his executor; and therefore, in case of his being disturbed, he may maintain a *quare impedit*^(x). So an executor may have an action of replevin for goods taken after the death of the testator^(y). An executor may also avow for rent accrued due after that time, as incident to a reversion for years, which vested in him in that character^(z).

[438] If a defendant in execution on a judgment recovered by the testator, escape after the testator's death, the executor shall have an action against the sheriff for the escape^(a); as he shall also in case the defendant were in execution on a judgment recovered by him as executor^(b).

So a bail-bond may be assigned to the executor of a deceased plaintiff, and he may bring an action upon it^(c): or a bill of exchange may be indorsed to A as executor, and he may in that character maintain an action on the bill against the acceptor^(d). And in like manner an executor may bring an action on any other contract made with him in his representative capacity^(e).

An executor may hold to bail on an affidavit of his belief of the existence of the debt, for the nature of his situation will not admit of his being more positive^(f). Therefore, if an executor swear to the books of the testator, and that he believes them to contain a true account, and the debt to be still unpaid, it shall be sufficient^(g). But an affidavit by an executor, that the defendant was indebted to his testator in fifty pounds as

(w) *Vid. supr.* 139.

Bonafous v. Walker, 2 Term Rep. 128.

(x) *Off. Ex.* 36.

(c) Fortes. 370.

(y) *Ibid.*

(d) King v. Stevenson, 1 Term Rep. 487.

(z) *Com. Dig. Admon.* B. 9. *Wankford v. Wankford*, 1 Salk. 302. 307. 11 Vin. Abr. 204. *Duncomb v. Walter*, 2 Show. 254. *Vid. supr.* 434.

(e) Com. Dig. Pleader, 2 D. 1. *Cro. Car.* 685. *Roll. Abr.* 602. 3 Bac. Abr. 93.

(a) 3 Bac. Abr. 57. *Off. Ex.* 46. *Godb.* 262. *Vid. supr.* 435.

(f) Mackenzie v. Mackenzie, 1 Term Rep. 716. 3 Bac. Abr. 101.

(b) *Slingsby v. Lambert*, 1 Roll. Rep. 276. *Wate v. Briggs*, 1 Ld. Raym. 35.

(g) 1 Cromp. Pract. 40.

appears by the testator's books, was held defective, and common bail ordered^(h). And so was an affidavit by an executor of a debt due to his testator, "as appears from a statement made from the testator's books, by an accountant employed by the deponent⁽ⁱ⁾."

[439] It is a general rule, that an executor, when plaintiff, shall pay no costs, either on a nonsuit, or verdict, for he sues in *auter droit*, and the law does not presume him to be sufficiently cognisant of the nature and foundation of the claims he has to assert^(k). Therefore, if an executor bring an action of trover on a conversion in the testator's lifetime, he shall not be liable to costs^(l). Nor shall he be liable if the trover were in the testator's lifetime, and the conversion after his death^(m). Nor shall he pay costs in an action for a debt due to the testator in his lifetime⁽ⁿ⁾. Nor in an action for a debt due on a contract made with the testator, which became payable after his death^(o). Nor shall an executor be subject to costs on a writ of error on a judgment recovered against the testator^(p); for, in all these instances, it is necessary for him to sue in his representative character, and expressly to name himself executor. But if he reside abroad and commence an action, the court will require him to give security for costs, although he sue in the capacity of executor^(q). Where a plaintiff sued as executor and was nonsuited, upon evidence given at the trial that the supposed testator was still alive: the Court of King's Bench refused to allow costs to the defendant, it appearing from affidavits on

^(h) 1 Cromp. Prac. 40. Walrond v. Fransham, Stra. 1219.

⁽ⁱ⁾ Rowney v. Dean, 1 Price Rep. 402.

^(k) 2 Bac. Abr. 46. 3 Bac. Abr. 100.

Cro. Jac. 228. Anon. Yelv. 168. 1 Roll. Rep. 63. Gale v. Till, Carth. 281.

S. C. 4 Mod. 244. S. C. 3 Lev. 375. Skin. 400. Portman v. Came, Stra.

682. 3 Bl. Com. 400. Tidd's Practice, B. R. 894. Fetherston v. Allybon,

Cro. Eliz. 503. 2 Bulst. 261. Jenkins v. Plume, 1 Salk. 207. Eaves v. Mo-

cato, ib. 314. Hawes v. Saunders, 3 Burr. 1586. Say. Costs. 97.

^(l) Cockerill v. Kynaston, 4 Term Rep. 277.

^(m) Ibid.

⁽ⁿ⁾ Ibid.

^(o) Anon. 1 Ventr. 92. 1 H. Bl. 528. Portman v. Cane, 2 Ld. Raym. 1413. S. C. Stra. 682. Vid. Cockerill v. Kynaston, 4 Term Rep. 278.

^(p) Gale v. Till, 3 Lev. 375. Vid. Cockerill v. Kynaston, 4 Term Rep. 280.

^(q) Chevalier v. Finnis, 3 Moore's Rep. 602.

both sides to be still at least doubtful whether the supposed testator were living or not^(r). But if he may bring the action in his private capacity, there, if he fail, he shall be liable to costs; as in an action for trover and conversion subsequent to the [440] testator's death^(s): Or if he bring an action for money belonging to the testator's estate, had and received by the defendant after the death of the testator^(t): Or if he bring an action on a bond executed to him by the defendant, for securing a debt due to the testator by simple contract^(u): Or if he fail by his own mispleaining^(w); Or if he bring a writ of error where he was liable to costs in the original action^(x): In all these cases the cause of action accrues to him personally; and, therefore, like every other plaintiff, he shall be subject to costs. Nor shall he be exempt by naming himself executor in an action, when there is no necessity to do so: otherwise he may in all cases indiscriminately evade the payment of costs^(y). If in an action at the suit of the executor, the defendant pay money into court, the effect of it will not be to make the plaintiff liable to pay, but only to lose his costs, in case he proceed, and fail to recover a farther sum^(z). An executor is subject to costs on a judgment of *non pros*^(a). And where he has *knowingly* brought a wrong action, or otherwise been guilty of a wilful default, he shall pay costs on a discontinuance^(b); or for not proceeding to trial according to notice^(c); but generally

(r) *Zachariah v. Page*, 1 Barn. & Ald. 386.

(s) 3 Bac Abr. 100. *Savil*. 134. *Latch*. 220. *Anon*. 1. *Ventr*. 92. *Hutt*. 78. *Salk*. 3, 4. *Bollard v. Spencer*, 7 Term Rep. 358. *Vid. Cockerill v. Kynaston*, 4 Term Rep. 279. *Hollis v. Smith*, 10 East. 293.

(t) *Goldthwayte v. Petrie*, 5 Term Rep. 234. *Vid. also Smith v. Barrow*, 2 Term. Rep. 477.

(u) *Vid. Cockerill v. Kynaston*, 4 Term Rep. 280.

(w) *Higgs v. Warry*, 6 Term Rep. 654.

(x) 1 H. Bl. Rep. 566.

(y) 3 Bac. Abr. 100. *Jones v. Wilson*, 11 Mod. 256. *Vid. Cockerill v. Kynaston*, 4 Term Rep. 280.

(z) 3 Bac. Abr. 100. *Gregg's Case*, 2 Salk. 596. *Cruchfield v. Scott*, 2 Stra. 796.

(a) *Tidd's Prac. B. R.* 379, 380. 895. *Ca. Pr. C. B.* 14. 157, 158. *Hawes v. Saunders*, 3 Burr. 1584. *Higgs v. Warry*, 6 Term Rep. 654.

(b) *Tidd's Prac. B. R.* 606, 607. 895. *Ca. Pr. C. B.* 79. *Harris v. Jones*, 3 Burr. 1451. *S. C. 1 Bl. Rep.* 451. *Clark v. Higgins*, 2 Root's Rep. 398.

(c) *Ca. Prac. C. B.* 158. *Hawes v. Saunders*, 3 Burr. 1585. *1 H. Bl.* 217.

[441] he is not liable to costs in either of those two cases (^d). Nor where he sues merely in *auter droit* is he subject to costs on a judgment, as in case of a nonsuit (^e).

Nor is it necessary for the executor or administrator of an attorney to deliver a bill of costs for business done by the deceased before the commencement of an action; for the stat. 2 Geo. 2. c. 23. § 23. is confined to actions brought by the attorney himself, and extends not to his personal representative (^f). And the Court of Common Pleas will not suffer such a bill to be taxed (^g). But in the Court of King's Bench the practice is different; for there the bill may be referred to be taxed, on the defendant's undertaking to pay what is due (^h). Yet where an attorney delivered his bill, and after his death application was made to tax it, and above a sixth part was taken off; on motion that the executrix may pay the costs, the court held her not to be liable, since the act imposes them on the attorney or solicitor only, and an executor is not to blame if he stand on the testator's bill, or make out one from his books (ⁱ).

Where the plaintiff dies after final judgment, and before execution, his executor or administrator shall sue execution by *scire facias* (^k). If after a *fieri facias* sued out the plaintiff die, the sheriff, deriving his authority from the writ, may levy the money, and may pay it to the executor; or in case the plaintiff died intestate, it shall be brought into court, and remain there until administration be committed, when the administrator, on producing the grant, shall receive it (^k). So if under a *fieri facias* the goods are seized, and the plaintiff die before sale, and then the goods are sold, the executor or admi-

(^d) *Baynham v. Matthews*, 2 Stra. 871. Barnes, 133. *Bennet v. Coker*, 4 Burr. 1927. Say. Costs. 96, 97. *Phoenix v. Hill*, 3 Johns. Rep. 249.

(^e) Tidd's Prac. B. R. 694. *Bennet v. Coker*, 4 Burr. 1928. Barnes, 130. *Booth v. Holt*, 2 H. Bl. 277.

(^f) Tidd's Prac. B. R. 919. 1 Barnard. K. B. 433. Andr. 276. Ca. Prac. C. B. 58.

(^g) Tidd's Prac. B. R. 919. Barnes, 119. 122.

(^h) Tidd's Prac. B. R. 919. Gregg's Case, 1 Salk. 89. *Weston v. Poole*, 2 Stra. 1056. Say. Costs. 324, 325. Imp. K. B. 482.

(ⁱ) Tidd's Prac. B. R. 919. *Wilson v. Poole*, 2 Stra. 1056. Say. Costs. 327.

(^k) Com. Dig. Execution, E. 2 Inst. 395. See Tidd's Prac. B. R. 1056.

(^l) *Clerk v. Withers*, 6 Mod. 297. Noy. 73. Dyer, 76 b. Tidd's Prac. B. R. 932, 933.

nistrator shall have the money ; nor shall it be a sufficient return to state that the plaintiff is dead, for that is no abatement of the writ (¹).

At common law, the death of the plaintiff at any time before final judgment, abated the suit ; but by stat. 17 Car. 2. c. 8, if either party die between verdict and judgment, his death shall not be alleged for error, so as the judgment be entered within two terms after the verdict (^m). In the construction of this statute, it has been holden, that the party's death before the assizes is not remedied ; but if he die after the assizes are commenced, although before the trial, that case is within the [443] act, for being remedial it shall be construed liberally (ⁿ). The judgment on this statute is entered as if the party were alive (^o), and it must be entered, or at least signed (^p), within two terms after the verdict. But there must be a *scire facias* to revive it, before execution can be taken out (^q) ; and such *scire facias*, pursuing the form of the judgment, should be general, as on a judgment recovered by or against the party himself (^r).

By a subsequent statute (^s), if the plaintiff die after interlocutory, and before the final judgment, the action shall not abate, if such action might originally have been sued by his executor or administrator ; but the executor or administrator may have a *scire facias* against the defendant ; or, if he die after such interlocutory judgment, against his executor or administrator. And if the defendant, his executor or administrator, appear, and show no cause to arrest the final judgment, or on a *scire facias*, or two *nihilis*, make default, a writ of inquiry shall go, and being executed and returned, judgment final shall be given against the defendant, or against his executor or ad-

(¹) *Clerk v. Withers*, 6 Mod. 297. *Cleve v. Vere*, Cro. Car. 459. *Harrison v. Bowden*, 1 Sid. 29. 2 Ld. Raym. 1073.

(^m) *Tidd's Prac. B. R.* 842. 1052, 1053.

(ⁿ) *Tidd's Prac. B. R.* 842. Anon. 1 Salk. 8. and vid. 2 Ld. Raym. 1415. in note. *Jacobs v. Miniconi*, 7 Term Rep. 31.

(^o) *Weston v. James*, Salk 42.

(^p) 1 Sid. 385. Barnes, 261.

(^q) *Earl v. Brown*, 1 Wils. 302.

(^r) *Colebeck v. Peck*, 2 Ld. Raym. 1280.

(^s) Stat. 8 & 9 W. 3. c. 11. s. 6. Vid. Com. Dig. Admon. (G.) and Hollingshead's Case, 1 P. Wms. 744.

ministrator. This statute has been held not to extend to cases where the party dies before interlocutory judgment, although it be after the expiration of the rule to plead (^c).

Where either party dies after interlocutory judgment, and before the execution of the writ of inquiry, the *scire facias* on [444] this statute ought to be for the defendant, or his executor or administrator, to show cause why the damages should not be *assessed*, and recovered against him (^u), and to hear the judgment of the court thereupon (^w). But where the death happens after the writ of inquiry is executed, and before the return, the *scire facias* must be to show cause why the damages assessed by the jury should not be adjudged to the plaintiff or his executor or administrator (^x).

The judgment on this statute is not entered for or against the party himself, as on the stat. 17 Car. 2, but for or against his executor or administrator (^y). And where the defendant dies after interlocutory and before final judgment, two writs of *scire facias* must be sued out, before he can have execution; one before the final judgment is signed, in order to make the executor or administrator a party to the record; the other after final judgment is signed, in order to give him an opportunity of pleading no assets, or any other matter of defence; for it were unreasonable that the situation of the executor or administrator should be worse, where the party deceased died before the final judgment was signed, than it would have been if his death had been subsequent (^z).

Whether an executor of a deceased partner must or can join [445] with the survivor in an action for goods carried away, or money had and received in the testator's lifetime, I have already stated to have been a matter of some doubt; but it seems now settled, that the latter must sue alone, as the remedy survives, although there be no survivorship of the duty (^a).

Before the stat. 31 Geo. 3. c. 87, an infant of the age of seventeen was capable of taking out probate, and therefore of

(^c) Tidd's Pract. B. R. 1055. Wallop v. Irwin, 1 Wils. 315.

243. and vid. Executors of Wright v. Nutt, 1 Term Rep. 388.

(^u) Lil. Entr. 647.

(^y) Weston v. James, 1 Salk. 42.

(^w) Smith v. Harman, 6 Mod. 144.

(^z) Say. Rep. 266.

(^x) Goldsworthy v. Southcote, 1 Wils.

(^a) Supr. 155, 156. 163.

maintaining an action as executor ; but, during his minority, he was obliged to sue by guardian, or *prochein amy* ; and could not sue by attorney.

But as, by this statute, probate shall not be granted to him till he shall have attained the full age of twenty-one years ; he cannot in his representative capacity sustain an action before that period.

If a married woman be executrix, the husband cannot sue in right of the testator without the wife^(b).

An executor named during the minority of another, has the same right to bring actions as an absolute executor^(c).

[446] As executors, in their representation of the testator, make but one person, they must all join in the bringing of actions in his right^(d) ; although some have omitted to prove the will, or have even refused before the ordinary^(e).

If an infant be co-executor with other persons of full age, he must, I apprehend, join with them in an action, and they shall all together sue by attorney ; for such was the law before the statute with regard to an infant under the age of seventeen^(f).

If A and B be appointed executors, and A refuse to join in such action, B may commence the action in the names of them both ; and then, on summoning A, there shall be judgment of severance ; that is to say, that B shall sue alone ; or on A's default on the summons, there shall be the same judgment ; and B then may proceed in the action, and recover in his own name only : otherwise, a co-executor by collusion with the debtor might prevent his being sued for the debt^(g). By the death of the party severed, the writ shall not abate^(h). Nor, if he

(b) Com. Dig. Admon. D. Off. Ex. 207, 208.

(f) 3 Bac. Abr. 618. 1 Roll. Abr. 288.

(c) Com. Dig. Admon. F. Semb. Off. Ex. 215, 216.

Cro. Eliz. 278. 2 Saund. Foxwist v. Tremaine, 212, 213. S. C. 1 Ventr. 102. S. C. 1 Sid. 449. Coan v. Bowles, Carth. 124.

(d) 3 Bac. Abr. 32. Off. Ex. 42. 95. 100. Godolph. 134.

(g) 3 Bac. Abr. 33. Price v. Packhurst, Cro. Car. 420. 2 Roll. Abr. 98. Off. Ex. 98, 99.

(e) Off. Ex. 42. Com. Dig. Abatement, E. 13. Pleader, 2 D. 1. 9 Co. 37. Swallow v. Emberson, 1 Lev. 161. Vid. supr. 41. 45.

(h) Anon. Cro. Eliz. 652. Co. Litt. 139.

live till judgment, can he sue out execution, because the recovery is in the name of the other executor alone (ⁱ). [1]

[447] If a judgment be recovered by two executors, and the one prays a *capias*, and the other a *fieri facias*; it has been said the *capias* shall be awarded as most beneficial for the estate (^k).

By the stat. 25 E. 3. c. 5. the executor of an executor is put on the same footing, in regard to the bringing of actions, as an immediate executor (^l).

An executor *de son tort* is not entitled to bring any action in right of the deceased. As he comes in by wrong, he is liable to all the trouble of an executorship, without any of its privileges (^m).

An administrator may, in right of his intestate, maintain actions in the same manner as an executor in right of his testator (ⁿ).

All special and limited administrators likewise may maintain actions in right of their respective intestates. And, indeed, the principle on which the ordinary has the power of granting such administrations, is, that there may be a person capable of recovering property belonging to the estate (^o).

[448] If an administrator *durante minoritate* bring an action and recover, and then his administration determine by the executor's coming of age, such executor may have a *scire facias* on the judgment (^p).

So if such administrator obtain judgment, he may bring a *scire facias* against the bail, nor can they object that the ex-

(ⁱ) Off. Ex. 105, 106.

(ⁿ) Com. Dig. Admon. B. 13. Off. Ex.

259.

(^k) 3 Bac. Abr. 33, in note. *Foster v. Jackson*, Hob. 61. *Vid. Hudson v. Hudson*, 1 Atk. 460.

(^o) *Walker v. Woolaston*, 2 P. Wms. 576. 6 Co. 67 b.

(^l) *Vid. Off. Ex. 257. Godb. 262.*

(^p) 3 Bac. Abr. 18. 1 Roll. Abr. 888, 889. *Cro. Car. 127. Hatton v. Mascal*, 1 Lev. 181. *Coke v. Hodges*, 1 Vern. 25.

(^m) 2 Bl. Com. 507. *Walker v. Woolaston*, 2 P. Wms. 583. *vid. supr. 366.*

[1] If one of two executors direct an appeal, writ of error, or *supersedeas*, originally granted to them both, to be dismissed, the other may proceed without him; and since both are before the court, an order of severance may be made without a summons. *Reno, Ex. v. Davis & Wife*, 4 Hen. & Munf. 288.

cutor has attained the age of twenty-one years; for the recognizance is to the administrator himself by name^(q). But it seems to be a question whether in such case he or the executor shall sue out execution on the judgment^(r).

If there be several administrators, they must, like co-executors, all join in an action^(s).

An administrator *de bonis non*, claiming by title paramount, could not at common law have a *scire facias*, or otherwise proceed on a judgment recovered by an executor, or administrator^(t): But now if a judgment after verdict be recovered by an executor or administrator, in such case an administrator *de bonis non* is by stat. 17 Car. 2. c. 8. entitled to sue a *scire facias*, [449] and take out execution on such judgment. If the executor or administrator die after suing out the writ of execution and before the return of it, the administrator *de bonis non* is, by the equity of that act, permitted to perfect the execution thus commenced, for the right is devolved upon him^(u). And in such case, if the sheriff return a seizure of goods to the value, but that they remain in his hands *pro defectu emptorem*, the administrator *de bonis non* may sue out a *venditioni exponas*, or *distringas nuper vice comitem*^(w). If at the time of the executor's or administrator's death, the money be levied, it shall be brought into court, and the administrator *de bonis non*, on producing the letters of administration, shall be entitled to receive it^(x). But if an executor bring a *scire facias* on a judgment, or recognizance, and get judgment *quod habeat executionem*, and die intestate, the administrator *de bonis non* must bring a *scire facias* on the final judgment, and cannot proceed in the judg-

(q) 3 Bac. Abr. 18. *Eubrin v. Manpesson*, 2 Lev. 37.

(r) *Ibid.* 2 Lev. 37.

(s) Com. Dig. Abatement, E. 14. Pleader, 2 D. 10.

(t) Com. Dig. Admon. G. *Levet v. Lewkenor, Moore*, 4. *Yate v. Goth*, ib. 680. *Cro. Jac.* 4. 1 Roll. Abr. 890. *Norgate v. Snape*, Wm. Jones, 214. *Snape v. Norgate*, Cro. Car. 167.

Tidd's Prac. B. R. 1057. *Grout, Adm. v. Chamberlain*, 6 Mass. T. R. 611.

(u) Com. Dig. Admon. G. *Clerk v. Withers*, 1 Salk. 322. S. C. 6 Mod. 290. S. C. 2 Ld. Raym. 1072. Vid. 1 Sid. 29.

(w) *Clerk v. Withers*, 1 Salk. 323. S. C. 6 Mod. 295. 297, 298, 299. S. C. 2 Ld. Raym. 1074

(x) *Ibid.* 6 Mod. 299, 300. ib. 2 Ld. Raym. 1074. 1076.

ment on the *scire facias* (^y). The statute extends only to judgments after verdict (^z). On any other judgment obtained by the executor or administrator, the administrator *de bonis non* shall not have a *scire facias* for want of privity, but must resort to his remedy at common law, by an action of debt *de novo* for the same demand, as administrator to the first testator or in- [450] testate (^a). Yet even on a judgment by default, if the executor or administrator sue out execution and die when the goods are in the hands of the sheriff, and consequently the writ is completely executed, the administrator *de bonis non* shall have the money brought into court, and on showing the grant, it shall be paid over to him (^b). Or if the judgment by default be for goods taken out of the executor's or administrator's own possession, his executor or administrator shall have a *scire facias* upon it, and account for them to the administrator *de bonis non* (^c).

In case a party died seised of a rent service, rent charge, rent seek, or see farm, in fee simple, fee tail, or *per auter vie* in the lifetime of *cestui que vie*, the common law afforded no remedy to recover the arrears due at the time when the owner of such rents died. It was therefore enacted by the stat. 32 H. 8. c. 37 (^d), that the executors and administrators of tenants in fee, fee tail, or for life, of such rents, may have an action of debt for all such arrears, or may distrain for the same upon the lands chargeable, so long as they remain in the possession of the tenant who ought to have paid the rents; or of any other person claiming under him by purchase, gift, or descent. The statute also provides, that a tenant *per auter vie*, his executors and administrators, may, after the death of *cestui que vie*, have [451] an action of debt, or may distrain for such arrears incurred in the lifetime of *cestui que vie*.

Before the passing of this act, the inconvenience did not exist to the same extent, in regard to the executor of tenant for his own life, or to the executor of tenant *per auter vie* after the

(^y) Tidd's Pract. B. R. 1053. Treviban v. Lawrence, 2 Ld. Raym. 1049.

(^z) Clerk v. Withers, 6 Mod. 296, 297.

(^a) See Com. Dig. Admon. G. Levet v. Lewkenor, Moore, 4. Yates v. Gough, 680. Cro. Jac. 4. Yaites v. Gough,

Yelv. 33. 5 Co. 9 b. Grout v. Chambelin, 4 Mass. T. R. 611.

(^b) Clerk v. Withers, 6 Mod. 299, 300.

(^c) Yaites v. Gough, Yelv. 33.

(^d) Vid. 3 Bac. Abr. 91. 2 Bac. Abr. 282, in note. 4 Burn. Eccl. L. 268.

death of *cestui que vie*: for by the common law an executor in either of those cases had a remedy, by action of debt, for the arrears of rent which had accrued in the lifetime of the testator^(e). But it has been adjudged, that the statute, being remedial, applies to the executors of all tenants for life; not merely to such executors as previously to the statute had no remedy whatever, but also to those who were entitled to an action of debt, to whom, therefore, it gives merely the additional remedy of distress^(f). Yet, although the executors of all tenants for life be authorized by the statute to distrain for such arrears^(g), it seems that rent reserved on a lease for years is not within its provisions, inasmuch as the landlord is not tenant in fee, fee tail, or for life, of such a rent; and the executor of such tenants only are mentioned in the act^(h). However, in trespass, where it appeared the defendant had distrained the plaintiff's goods for rent due to his testator on a lease for years, Lee, C. J. held it to be comprehended by the statute, and the defendant obtained a verdict⁽ⁱ⁾.

Nor does the statute extend to the executor of the grantees of a rent-charge for a term of years, if he so long live^(k); nor to copyhold rents, but only to rents out of free land^(l).

But the executor of an executor is held to be within the equity of this statute^(m).

An executor may also prove a debt due to the testator under a commission of bankruptcy⁽ⁿ⁾.

A commission was taken out by an executor before he had obtained probate. Probate was afterwards obtained on the 5th of March 1817, and the adjudication of the bankruptcy was on the 8th of March following, and the commission was held valid^(o).

^(e) Harg. Co. Litt. 162, note 4. Gilb. L. of Distress, 3d edit. 33.

M. 25 Geo. 2.

^(f) Harg. Co. Litt. 162 b. note. Hool v. Bell, 1 Ld. Raym. 172. Cro. Eliz. 322. L. of Ni. Pri. 5th edit. 55. Gilb.

L. of Distress, 3d edit. 33. Sed vid.

Cro. Car. 471.

^(m) Off. Ex. 258.

^(g) Hool v. Bell, Ld. Raym. 172.

⁽ⁿ⁾ Ex parte English, 2 Bro. Ch. Rep. 610.

^(h) L. of Ni. Pri. 5th edit. 57. Gilb.

^(o) Ex parte Paddy in re Drakely, 3 Madd. Rep. 241. and see Rogers v. James, 2 Marshall, 425.

⁽ⁱ⁾ Powel v. Killick, at Westminster,

In case a commission has been superseded, the executors of the party, against whom it issued, may take out a commission for a debt due to him ; but if it has not been superseded, they have no such right ; for the debt having vested in his assignees, the executors are incapable of being the petitioning creditors (^p).

Executors, in their representative character, may sign a bankrupt's certificate (^q). And even where the bankrupt's [453] ther, being principal creditor, chose himself sole assignee, and dying intestate, the bankrupt, as his representative, chose himself assignee, and signed his own certificate, it was held regular (^r). But an executor, who has also a claim in his own right, cannot sign in both capacities (^s).

If a bankrupt's estate pay a clear dividend of ten shillings in the pound, and he obtain his certificate under the commission, his representatives are entitled to the allowance (^t).

By the stat. 19 Geo. 2. c. 37. s. 4, it is enacted, that in case an assurer shall die, his executors or administrators may make re-assurance to the amount before by him assured, provided it be expressed in the policy to be a re-assurance : and thus a fund may be secured to satisfy the insured in case of a loss, without its falling on the estate of the deceased.

In case of the death of a person insured against fire, the policy of insurance and interest therein shall continue to his heir, executor, or administrator respectively, to whom the property insured shall belong, provided, before any new payment be made, such heir, executor, or administrator shall procure his right to be indorsed on the policy at the office, or the premium be paid in the name of the heir, executor, or administrator (^u).

(^p) *Ex parte Goodwin*, 1 Atk. 100.

(^t) *Whitmarsh's B. L.* 2d edit. 351.

(^q) *Whitmarsh's B. L.* 2d edit. 356.
1 Atk. 85.

Ex parte Calcot, 1 Atk. 208, 209.
S. C. 3 Atk. 814.

(^r) *Ibid. Green*, 260.

(^u) *Park on Insurance*, 449. 5th edit.

(^s) *Ex parte Saumerez*, 1 Atk. 85.

[454] SECT. II.

Of remedies for executors and administrators in equity.

AN executor or administrator is also entitled to all the equitable interests of the deceased, and may, in his representative capacity, enforce them in a court of equity (^a).

Such interest vested in the testator shall vest in the executor, although he be not named : as if a legacy be given to A, and if he die under age, to B and C, or the survivor of them ; and first B die, then C, and lastly A die under age, the legacy shall be decreed to the executor of C, who survived B (^b).

Partners in trade are interested in the whole stock and effects, not merely in that particular stock in being at the time of entering the partnership, but continue so through all its changes. In case of the death of one partner, his interest, as we have seen (^c), at law vests in his representatives, and shall not survive to the other, although the legal remedy survive : In equity, the survivor is regarded as a trustee for them, on which footing the account shall be taken, nor any thing considered as his share till after it ; inasmuch as the property in the stock continues in such representatives : and they have a specific lien upon it, although the survivor should afterwards die, or become bankrupt (^d). The representatives of a deceased partner, or the assignees of a bankrupt partner, are not, strictly speaking, partners with the survivor, or the solvent partner ; but, in either case, that community of interest still subsists, which is necessary till the affairs are wound up, and which requires that what was partnership property before, shall continue so for the purpose of distribution, according to the rights of the partners (^e).

If, pending a suit, the plaintiff die, his executor may continue it by bill of revivor, and have the full benefit of the proceedings (^f).

(^a) *Vid. Com. Dig. Chancery, 2 B. 1.* (^c) *Supr. 155, 156. 163.*

3 G. 1.

(^d) *West v. Skip, 1 Ves. 242.*

(^b) *Com. Dig. Chancery, 3 G. Anon.*
2 Ventr. 347.

(^e) *Ex parte Williams, 11 Ves. jun. 5.*
(^f) *Mitf. 63, 64.*

The executor of a person having written private letters to J. S. may maintain a bill in equity to restrain J. S. or his representatives from publishing them without the leave of the plaintiff^(g).

If the executor find the affairs of the testator so complicated, as to render the administering of the estate unsafe, he may institute a suit against the creditors, for the purpose of having their several claims adjusted by the decree of the court^(h). But such bill will not entitle him to an injunction to restrain any creditor from proceeding against him at law: for that purpose, it is necessary that there be a suit and decree, by and on behalf of the creditors of the testator⁽ⁱ⁾.

A decree against him in such suit to account is, however, sufficient to ground such an application; and, therefore, if after such decree a creditor of the testator proceed at law, the [456] executor may move that the creditor may be restrained from thus proceeding, and be directed to come in under the decree, and prove his debt before the master with the other creditors of the testator: but an affidavit by the executor, that he had paid all the assets into court, is indispensably necessary to support the motion, and such creditor shall be allowed the costs of his proceedings at law before actual notice of the decree^(k). If he proceed at law after such notice, he shall be subject to the costs of the subsequent proceedings^(l). If the creditor proceeding at law has recovered a judgment *de bonis testatoris*, the court will restrain him from taking out execution; but if he has obtained a verdict, which will entitle him to a judgment *de bonis propriis* against the executor, the court will not restrain him from proceeding at law^(m).

(g) Thompson *v.* Stanhope, Ambl. 737.

(h) Com. Dig. Chancery, 3 G. 6. 2 Fonbl. 2d edit. 408, note (t). Buckle *v.* Atleo, 2 Vern. 67.

(i) 2 Fonbl. ibid. Rush *v.* Higgs, 4 Ves jun. 638.

(k) Gilpin *v.* Lady Southampton, 18 Ves. 469 and see Jackson *v.* Leaf, 1 Jac. & Walk. 229.

(l) Potts *v.* Layton, Ex'x. Mich. T. 1802, at Westminster, before Sir Wm Grant, M. R. sitting for Lord Eldon, C. and afterwards in the same term before Lord Eldon, C. See also Kenyon *v.* Worthington, Dick. Rep. 668.

(m) Terrewest *v.* Featherby, 2 Merl. Rep. 480. and Brook *v.* Skinner, in note.

It is a general principle, that an executor shall have no allowance in equity for his trouble in the execution of the trust reposed on him, unless directed by the will (^a) ; and least of all where a legacy is expressly left him as a recompense. Nor is the case altered by his renunciation of the executorship, and his afterwards assisting in it ; nor although it appear that he has deserved more, and has benefited the estate to the prejudice of his own affairs (^b). And even where an executor in trust, who had no legacy, in a case in which the execution of the office was likely to be attended with trouble, at first declined, but afterwards agreed with the residuary legatee, in consideration of a hundred guineas, to act in the executorship ; and on his dying [457] before the execution of the trust was completed, his executors filed a bill to be allowed that sum out of the trust money in their hands, the court refused the claim, observing, that independently of the executor's having died before the trust was executed, such bargains ought to be discouraged as tending to dissipate the property (^c). But an executor in India of a party domiciled in that country, not having a legacy, was held, on passing his accounts in the court of chancery here, to be entitled to a commission at the rate of 5 per cent. on receipts and payments, according to the practice in India (^d). So where, after goods were consigned to a factor, the principal died, having appointed him executor, and then the goods came to his hands, it was decreed, that he should be allowed factorage and commission for them (^e). If, however, an executor in India has a legacy for his trouble, he will not be entitled to commission, either on his receipts or payments as executor ; nor will he be allowed in passing his accounts, after a series of years, to renounce his legacy, and charge commission on such receipts and payments (^f). [1]

(^a) 11 Vin. Abr. 433. *Robinson v. Pett*, 3 P. Wms. 251. *Ellison v. Airey*, 1 Ves 115. *Scattergood v. Harrison*, Mosel. 128. *vid. Barwell v. Parker*, 2 Vez. 365. *Jones v. Williams*, 2 Call. 102.

(^b) *Robinson v. Pett*, 3 P. Wms. 249. (^c) *Gould v. Fleetwood*, Mich. 1732.

at the Rolls, cited 3 P. Wms. 251. note (^a).

(^d) *Chetham v. Lord Audley*, 4 Ves. jun. 72.

(^e) *Scattergood v. Harrison*, Mosel. 128.

(^f) *Freeman v. Fairlie*, 3 Merl. Rep. 124.

[1] In the following states, compensation to executors and administrators is allowed by statute :—viz. Rhode Island, New York, Virginia, Kentucky,

If two executors are plaintiffs in equity, and one of them is excommunicated, the other may be severed, and the defendant shall answer him (^t). One executor may sue his co-executor in equity (^u). In case of a suit by co-executors, the proceedings do not abate by the death of one of them (^v).

If a temporary executor prove the will, and afterwards his [458] executorship determine, the subsequent executor may maintain a suit without another probate (^w).

An administrator shall be relieved in chancery against a fraud to his administration: As if the grant be wrongfully obtained, and afterwards repealed on citation, an assignment of a term by the grantee in trust for himself shall be revoked, and avoided by the subsequent administrator (^x).

If a bill be brought by an administrator *durante minoritate*, and pending the suit, the executor come of age, he may continue the suit by a supplemental bill (^y).

In case an administration be determined by death, a bill of revivor by a subsequent administrator has been admitted (^z).

SECT. III.

Of remedies at law against executors and administrators.

I AM now, in the last place, to treat of the remedies against [459] executors and administrators, or the means which the law prescribes to enforce the performance of their various duties.

As representatives of the deceased they are answerable, whether expressly named or not, as far as they have assets, for all

(^t) *Prac. Reg. in Chancery*, 2d edit. Ca. 265.

209.

(^x) 2 Ch. Ca. 129. *Com. Dig. Chan.*

(^u) *Ibid. Vid. 11 Vin. Abr.* 363. 365.

2 B. 1.

3 Bac. Abr. 32.

(^y) *Mitf. 61.*

(^v) *Hinde's Prac. in Chan.* 47.

(^z) *Mitf. 61*, in note. *Owen v. Curzan*,

(^w) *Pract. Reg.* 2d edit. 209. 1 Ch.

2 Vern. 237. 2 Eq. Ca. Abr. 3, 4.

South Carolina, and Georgia; and it is presumable that such compensation is given in all the states, either by statute or established custom.

In Pennsylvania, as far back as the testamentary law can be traced, an executor has always had a compensation for his services. *Wilson v. Wilson*, 3 Binn. 560.

his debts, covenants, and other contracts^(a). An executor is thus liable for all debts due from the testator by judgment, statute, recognizance, obligation, or other debts by record or specialty^(b).

So an action of debt lies against the executor of a sheriff, on a judgment recovered against the testator, for an escape^(c).

So an action may be maintained against an executor on other inferior debts of record, as issues forfeited, fines imposed at the assizes, quarter sessions, by commissioners of sewers, or bankrupts, by stewards in leets, or the like^(d).

He is also subject to an action on the testator's obligation: or on his covenant, as to pay rent^(e), or to repair premises^(f). An executor may, likewise, be sued by the lord of the manor [460] for a relief due from the testator^(g). So an action lies against an executor on simple contract of the testator, either in writing or by parol, either express or implied; as on bills of exchange and promissory notes, debt for rent on a parol lease^(h), or *assumpsit* for money had and received by the testator to the plaintiff's use⁽ⁱ⁾. So an action may be maintained by a gaoler against an executor for provisions found for the testator in prison^(k): Or against the executor of a sheriff, who levied money on a *fieri facias*, and died before he paid it^(l): Or, as it seems, against an executor on a collateral promise by the testator^(m), as where he promised to give A a sum of money in consideration that he would marry B.

In short, in all cases where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator

(a) 3 Bac. Abr. 95. Off. Ex. 117, 118. Salk. 309. S. C. Ld. Raym. 553.
Cro. Car. 187. Morgan v. Greene, Jon. 223. Howse v. Webster, Yelv. 103. Dyer, 23.

(g) Com. Dig. Admon. B. 14. Noy. 43, 44.

(b) Com. Dig. Admon. B. 14. Off. Ex. 118. (h) Com. Dig. Admon. B. 14.
(i) 9 Co. 89 b. 10 Co. 77 b. Cro. Car. 294. Plowd. 182.

(k) 9 Co. 87 b.

(c) Dyer, 322. (l) Com. Dig. Admon. B. 14. 1 Roll. Abr. 921. Jon. 430. Mar. 13.

(d) Com. Dig. Admon. B. 14. 1 Roll. Rep. 14. Cro. Jac. 404. S. Bul. 2. 6. Sti. 158. Ow. 56, 57. Palm. 329. Jon. 16.

(e) Billinghurst v. Speerman, Salk. 297. Sti. 387. 406. Com. Dig. Covenant. C. 1.

(f) Tilney v. Norris, Carth. 519. S. C.

by the work and labour or property of another, or a promise of the testator, impress or implied; the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto* supposed to be by force and against the king's peace, there the action dies, as battery, false imprisonment, trespass, slander, nuisance, diverting a watercourse, escape, or on a penal statute, and many other cases of the like kind (^a).

[461] Such are the species of actions which survive against an executor, or die with the person on account of the *cause* of action. But there are other species of actions, which survive or die in respect of the *form*.

In some actions the defendant could have waged his law, as in debt on a simple contract, and therefore no action in that form lies against an executor; but now other actions are substituted in their room, on the very same cause, which survive, and may be maintained against him.

No action, where in form the declaration must be, *quare vi et armis, et contra pacem*, or where the plea must be, that the testator was not guilty, will lie against an executor.

On the face of the record the cause of action arises *ex delicto*, and all private criminal injuries, or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, another action may be brought, which will answer the purpose. An action on the custom of the realm, against a common carrier, is for a *tort* and supposed crime; the plea is not guilty, and therefore an action will not lie against an executor; but *assumpsit*, which is another action for the same cause, is maintainable. So if a man take a horse from another, and bring him back again, [462] an action of trespass will not lie against the executor, though it would have lain against the party himself. But an action for the use and hire of the horse will lie against the executor (^b). Nor is the executor chargeable for the injury done by his testator in cutting down another man's trees; but for the benefit arising to the testator from the value or sale of the

(^a) Com. Dig. Admon. B. 15. Off. Ex. 127, 128. 3 Bl. Com. 302. Hambly v. Trott, Cowp. 375. *Pitkin*, 1 Root's Rep. 216. (^b) Ibid. Cowp. 375.

trees, he may be called upon to answer (p). Nor will trover lie against an executor for a conversion by his testator; for in that case the form of the plea is, that the testator was not guilty, and the issue is to try the guilt of the testator: But if the testator sold the property in his lifetime, his executor shall be charged in an action for money had and received by the testator to the plaintiff's use.

The fundamental distinction, then, is this: If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer; as for example, beating or imprisoning a man, there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury, and therefore the executor is not liable: But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the representative (q).

The executor is also liable on contracts of the testator, [463] though the cause of action accrue not till after his death; as on a bond which becomes due, or a note payable subsequently to that event (r).

The liability of an executor to the payment of rent incurred after the testator's death, has been already considered (s).

In the cases which I have been enumerating, the executor shall be liable only to the amount of the assets (t). The judgment against him is for the debt or damages, to be levied of the goods and chattels of the testator in the hands of the defendant, if he have so much thereof in his hands to be administered (u). But there are cases in which he shall be personally responsible, *de bonis propriis*; as if he commit any of those acts which constitute a *devastavit*, on its being duly substantiated, he must answer out of his own estate for the value of what he has wasted (x). An executor may also make himself chargeable in his private capacity to the plaintiff's demand, by pleading a plea the falsehood of which lies in his own knowledge, and

(p) *Hambly v. Trott*, Cowp. 376.

(u) *Vid. Tidd's Pract. B. R.* 941. and
infr.

(q) *Ibid.* Cowp. 376, 377.

(x) *Com. Dig. Admon.* I. 3. S Bac
Abr. 77. Off. Ex. 157. 164.

(r) *Com. Dig. Pleader*, 2 D. 2.

(s) *Vid. supr. 278. et seq.*

(t) 9 Co. 88 b.

which, if true, would be a perpetual bar to the action^(y); therefore, if an executor plead *ne unques executor*, that he never was executor^(z), or plead a release made to himself^(a), and it is found against him; the judgment shall be in the alternative, [464] *de bonis testatores, et si non, de bonis propriis*. An executor may also make himself personally liable by his promise to pay a debt of the testator, or answer damages out of his own estate; but, pursuant to the statute of frauds, such promise, or some note or memorandum thereof must be in writing, and signed by him, or some other person by his authority^(b). There must also be a sufficient consideration to support the promise: It must be alleged and proved, that assets were come to his hands; or that in consideration the creditor would forbear to sue him, he promised to pay the debt^(c). [1] Or an admission of assets must be implied from the nature of the promise itself; as where the defendant owned the money lay ready

(y) Off. Ex. 85. 3 Bac. Abr. 87. 1 Roll. Abr. 93. Godolph. 98. 11 Vin. Abr. 388. Howard v. Jemmet, 1 Bl. Rep. 400.

(z) 1 Roll. Abr. 930. 933.

(a) Cro. Jac. 671, 672.

(b) Vid. stat. 29 Car. 2. c. 3. s. 4. Hawkes v. Saunders, Cowp. 289. and Rann v. Hughes, 7 Bro. P.C. 551.

(c) Trevinian v. Howell, Cro. Eliz. 91. Reech v. Kennegal, 1 Ves. 125. Hawkes v. Saunders, Cowp. 293. Rann v. Hughes, 7 Bro. P.C. 551.

[1] In Pennsylvania, assumpsit for money had and received will lie against an executor personally, to recover a distributive share of the personal estate of the testator, undisposed of by the will. *Wilson v. Wilson*, 3 Binn. 557.

But an action for money had and received does not lie, by an administrator *de bonis non*, against the administrator of an executor, to recover the undisposed surplus. *Allen & al. v. Irwin & al.* 1 Serg. & R. 549. It seems, a creditor or legatee of the testator may maintain an action against such administrator of the executor. *Ibid.*

Where A, the administrator of B deceased, gave a promissory note to C, by which he "promised to pay C 61 dolls. 72 cts. for value received by B and his heirs, on demand, with interest until paid," the note was held to be void for want of consideration. *Ten Eyck v. Vanderpool*, 8 Johns. Rep. 120.

If the creditor of a decedent take a bond from an executor or administrator, he discharges the debt. The calling himself executor or administrator in the bond is surplusage, and he is chargeable only in his own right. The plaintiff, on a judgment against the administrator on such bond, cannot take the estate of the intestate in execution. *Geyer v. Smith*, 1 Dall. 347. n.

for the plaintiff whenever he would call for it (^d): and where executors gave a note to a creditor whereby they promised "as executors" to pay, &c. with interest (^e). In all these cases the executor shall be liable to the same species of judgment. Forbearance to sue, although the remedy be only in equity, is a sufficient consideration (^f).

But, in case there be no assets, a promise by an executor to pay a debt of the testator is *nudum pactum* (^g). And on a plea of *plene administravit*, proof of an admission by the executor that the debt was just, and should be paid as soon as he could, is not evidence to charge him with assets (^g).

Nor shall an executor's paying interest on a bond due from the testator be considered as an admission of assets for the principle (^h). Nor shall an executor's merely submitting to an award amount to an admission of assets (ⁱ). But if the executor bind himself by a personal engagement to perform the award; or if his submission to arbitration be a reference, not only to the cause of action, but also of the question, whether he has or has not assets, and the arbitrator award the executor to pay the amount of the plaintiff's demand, it is equivalent to determine, as between the parties, that the executor had assets to pay the debt. The defendant therefore is concluded by the award, although it will not operate as an admission of assets in any other litigation, and he may be attached for non-payment (^k).

According to a modern decision, an action may be maintained in a court of common law against an executor, in that character, on his express promise to pay a legacy in consideration of assets (^l). And in another case it was also ruled that on the

(^d) *Camden v. Turner*, cited Cowp. 293

(^e) *Childs v. Monins*, 2 Brod. & Bing. 460

(^f) 3 Bac. Abr. 90. 1 Sid. 89. *Scott v. Stephenson*, 1 Lev. 71. 1 Roll. Rep. 27.

(^g) *Pearson v. Henry*, 5 Term Rep. 8. (^h) *Hindsley v. Russell*, 12 East, 232.

(ⁱ) *Pearson v. Henry*, 5 Term Rep. 8.

(^j) *Ibid.* 5 Term Rep. 6. *Hoare v. Mulloy*, 2 Yeates, 161.

(^k) *Barry v. Rush*, 1 Term Rep. 691. *Pearson v. Henry*, 5 Term Rep. 7. *Worthington v. Barlow*, 7 Term Rep. 453.

(^l) *Atkins v. Hill*, Cowp. 284.

same promise, grounded on the same consideration, an action will lie against an executor personally in his own right^(m) [2]

But this doctrine has been exploded by subsequent adjudications. It is true, that in the case on which one of them was [466] founded, the executor had not, as in the two former instances, *expressly* promised to pay the legacy; yet two of the three learned judges, who decided it, reasoned on general principles, and denied the jurisdiction of the courts of common law over the subject of legacy, without reference to any distinction between an express and an implied promise. They held, that policy and convenience forbade the courts of common law to entertain this species of action, since they can impose no terms on the party suing: Whereas courts of equity in such suits interfere in a manner highly beneficial to private families; as on a bequest of a legacy to the wife, they require the husband to make an adequate settlement on her, as the condition of his recovering it⁽ⁿ⁾: But if he might resort to an action, the wife and children would, in a variety of instances, be left destitute of all provision. They also observed, that the only other precedent of such an action occurred in the time of the usurpation; and the reason there assigned for allowing it, was to prevent a failure of justice, as the ecclesiastical courts were at that time abolished, and the court of chancery did not then take cognizance of legatory matters, and these principles have been adhered to in decisions still more recent.^(o).

Although an executor be entitled, as we have seen (P), to sue [467] in a court of conscience, he is not liable to be sued there.

(m) *Hawkes v. Saunders*, Cowp. 289. *Clark v. Herring*, 5 *Binn.* 33.

(n) *Vid. Browne v. Elton*, 3 P. Wms. 202. and *supr.* 320, 321.

(o) *Deeks v. Strutt*, 5 Term Rep. 690. *Vid. also Farish v. Wilson*, Peake's

Ni. Pri. Rep. 73. See 4 Bac. Abr. 446, in note. *Rawlinson v. Shaw*, 3 Term Rep. 557. and *Mayor of Southampton v. Graves*, 8 Term Rep. 593.

(P) *Supr.* 436.

[2] If the executor promise to pay a legacy as soon as he can sell, &c., action at law lies. *M'Neil & Wife v. Adm. of Quince*, 2 Hayw. Rep. 153.

In Pennsylvania, an action against the executor for a legacy is given by statute.

The recovery of a legacy cannot be barred by the statute of limitations. *Ward v. Reeder*, 2 Har. & M'Hen. 154.

The legislature could not intend to give to such a court an authority to inquire into the conduct of executors, and to take an account of assets (q).

Executors and administrators shall not in general be held to bail, for they are not personally liable, but only in respect of the assets. [3] It were unreasonable to subject them to an arrest in their representative capacity (r). But they may be held to bail, if it appear that they have wasted the property (s). Yet a bare suggestion of a *devastavit* is not sufficient for that purpose without the oath of the plaintiff (t). So where on a judgment against an executor, execution is sued out, and the sheriff returns a *devastavit*, in an action to debt on the judgment the executor may be required to put in special bail (u). Where an executor has personally promised to pay a debt, it seems he may be holden to bail on such promise (w).

An executor defendant shall pay costs in case he plead a plea which is false within his own knowledge. And the judgment for the costs is *de bonis testatoris si, et si non, de bonis propriis* (x). [468] So where a bankrupt who was sued as executor pleaded a false plea, and it being found against him, the plaintiff had judgment for the costs *de bonis propriis*, after which the defendant obtained his certificate, it was held that the judgment for the costs was not discharged by the certificate (y). But where

(q) Stat. 14 G. 2. c. 10. Doug. 263. Tidd's Prac. B. R. 873.

(r) 3 Bac. Abr. 101. Cro. Jac. 350. Hargrave v. Rogers, Yelv. 53. Sir Henry Mildmay's Case, Cro. Car. 59. Litt. Rep. 2. 1 Crompt. Prac. 29.

(s) 1 Crompt. Prac. 29. Anon. 1 Lev. 39. Dupratt v. Testard, Carth. 264. Anon. 1 Mod. 16.

(t) 3 Bac. Abr. 101. 1 Crompt. Prac. 101.

(u) 3 Bac. Abr. 101. Dubray v. Comb. 206. Boothsby v. Butler, 1 Sid. 63.

(w) Mackenzie v. Mackenzie, 1 Term Rep. 716.

(x) 3 Bac. Abr. 100. Tidd's Prac. B. R. 896. Plowd. 183. Hardr. 165. Cro. Eliz. 503. Hutt. 69. 79. Farr v. Newman, 4 Term Rep. 641. Bolland v. Spencer, 7 Term Rep. 359.

(y) Tidd's Prac. B. R. 81, 82. 896. Howard v. Jemmet, 3 Burr. 1368. S. C. 1 Bl. Rep. 400.

[3] In Pennsylvania, an executor may be proceeded against by *capias*, to compel an appearance. *Penrose v. Penrose & al.* cited 2 Binn. 440.

an executor pleads *plene administravit*, and the plaintiff admitting the truth of the plea, takes judgment of assets *in futuro*, the defendant is not liable to costs^(z). Nor, as it seems, is he so liable where he pleads *plene administravit præter*, and the plaintiff admitting the truth of the plea, takes judgment of the assets admitted in part, and for the residue of assets *in futuro*^(a). So where an executor pleads several pleas to the whole declaration, as *non assumpsit*, *ne unques executor*, and *plene administravit*, and one of them is found for him, he is entitled to the postea and costs, although the other plea be found against him^(b). But if the plaintiff take judgment of assets *in futuro* on the plea of *plene administravit*, and go to trial on the plea of *non assumpsit*, he will be entitled to costs, if he obtain a verdict; and, therefore, in such case, unless the defendant have a good ground of defence on *non assumpit*, it is usual for him to move to withdraw his plea, which the court will permit him to do on payment of costs^(c). An executor defendant shall have costs in case of a judgment in his favour^(d). [4]

[469] If the defendant die after final judgment, and before execution, the plaintiff shall sue out the same by *fieri facias* against the personal representatives^(e). But a *fieri facias*, if

(z) Tidd's Prac. B. R. 896. Imp. Prac. v. Grimp, 2 Bl. Rep. 1275. Hindsley B. R. 428. v. Russell, 12 East, 232.

(a) See Rast. Ent. 323. 8 Co. 134. (d) 3 Bac. Abr. 100.
Noel v. Nelson, 2 Saund. 226. S. C. (e) Com. Dig. Execution, (F.) Pleader, Sid. 448. 3 L. 7. Dy. 76 b. Tidd's Prac. B. R. R.

(b) Edwards v. Bethee, 1 Barn. & Ald. 254. 1056. Heapy v. Parris, 6 Term Rep. 268. Bragner v. Langmead, 7 Term

(c) Tidd's Prac. B. R. 896, 897. Dearne Rep. 24.

[4] An executor, who qualified under a will which was admitted to probate, though it was afterwards litigated, and a second will established, and who did not refuse to give security as required by the Act of 1791, is to be allowed for payments made by him *pendente lite*, for the costs and expenses of the litigation, and his commissions. Bradford v. Boudinot, C. C. Oct. 1811. MS. Rep.

If the defence made by an administrator be for the promotion of his own private interest, he cannot throw the costs on the estate of the intestate. Hartzell v. Brown, 5 Binn. 138.

tested before the defendant's death, although not delivered to the sheriff till after it, may without a *scire facias* be executed on his goods in the hands of his executor or administrator^(f). And, as we have seen, (g), a judgment signed at any time during the term, or the vacation next following, relates back to the first day of the term, although the defendant died before the judgment was actually signed; and an execution tested the first day of the term may be taken out upon it against the goods^(h).

A judgment recovered against an executor or administrator, is, as we have seen⁽ⁱ⁾, usually for the debt or damages and costs, to be levied of the goods and chattels of the testator or intestate in the hands of the defendant, if he hath so much thereof in his hands to be administered; and if he hath not, then the costs to be levied of his own proper goods^(k). In such case the course is for the plaintiff to sue out a *scire facias de bonis testatoris, &c. et si non, de bonis propriis*, according to the judgment^(l), upon which the sheriff returns either *nulla bona* generally, or *nulla bona*, and a *devastavit* by the defendant^(m). On the former return, the plaintiff must proceed by *scire fieri* inquiry⁽ⁿ⁾, or by action of debt on the judgment suggesting a *devastavit*. On the latter he may have execution immediately against the defendant by *capias ad satisfaciendum*, or *fieri facias de bonis propriis*^(o). So, on a *devastavit* returned, a writ of *elegit* will lie against an executor or administrator^(p).

On execution against an executor or administrator in case of the defendant's death before final judgment, I have already treated^(q).

If the plaintiff confess the plea of *plenè administravit*, or *plenè administravit præter*, there shall be judgment in his favour for

(f) Com. Dig. Execution, D. 2. F. Semb.

Anon. 2 Ventr. 218. R. Skin. 257.

(g) Supr. 266.

(h) Bragner v. Langmead, 7 Term Rep. 20.

(i) Supr. 463.

(k) Tidd's Prac. B. R. 941. Farr v. Newman, 4 Term Rep. 648. Bolland

v. Spencer, 7 Term Rep. 359.

(l) Gibson v. Brook, Cro. Eliz. 886.

(m) Thes. Brev. 116, 117.

(n) Lil. Ent. 664.

(o) Tidd's Prac. B. R. 942. Thes. Brev. 46, 47. 122. 125.

(p) Tidd's Prac. B. R. 957. 1 Crompt. Prac. 346. 2 Leon. 188.

(q) Supr. 443, 444.

the debt or damages, and costs, to be levied, as to the whole or in part, of the goods of the testator or intestate which shall afterwards come to the hands of the defendant to be administered. And such judgment is styled a judgment of assets *quando acciderint*; but in that case execution cannot be had until the defendant shall have goods of the deceased, when the plaintiff may either sue out a *scire facias*, or bring an action of debt on the judgment suggesting a *devastavit* (r). [5]

[471] Before the stat. 38 Geo. 3. c. 87. an infant executor, after he had attained the age of seventeen, might have been sued; in which case he was to appear by guardian, and not by attorney, when the same judgment might have been recovered against him as against any other executor (s); but in consequence of that act, till he comes of age he is neither capable of suing, nor liable to be sued.

A limited executor is also subject to be sued during the continuance of his office (t).

In an action against a married woman executrix, the husband must be joined (u). On a judgment against husband and wife executrix, if she survive, an action of debt does not lie suggesting a *devastavit* by the husband; for, although, in case she married after the testator's death, she is answerable for the wasting by the husband (v), yet she shall not be charged *de bonis propriis* for the costs recovered against him (x).

(r) Tidd's Prac. B. R. 1038, 1039.
1041. 8 Co. 134. and vid. Dorchester
v. Webb, Cro. Car. 372. Sed vid. Noel
v. Nelson, 2 Saund. 226. 1 Sid. 448.
Noel v. Nelson, 1 Lev. 286. Noel v.
Nelson, 1 Ventr. 94, 95. 2 Keb. 606.
621. 631. 666. 671. Hob. 199. Gill v.
Scrivens, 7 Term Rep. 29.
(s) 3 Bac. Abr. 9. 618. 1 Roll. Abr.

287, 288. Poph. 130. Cro. Jac. 420.
Westcott v. Cottle, 1 Roll. Rep. 380.

(t) Vid. Off. Ex. 215, 216.

(u) Com. Dig. Admon. D. Off. Ex.
203. 207. 3 Bac. Abr. 9.

(v) Vid. supr. 358, 359.

(x) Com. Dig. Admon. I. 3. Horsy v.
Daniel, 2 Lev. 161.

[5] On the plea of no assets, the practice of Pennsylvania is, for the jury to find for the defendant, and for the plaintiff to pray judgment *de terris*, &c. and of assets *quando acciderint*, which is entered as a matter of course. *Wilson v. Hurest's Ex.* 1 Peters' Rep. 442, in note.

If there be several executors, they must be all sued (^y), in case they have all administered. But such as have not administered may be omitted (^z): for although executors themselves must be conscious how many are named by the will, and must, [472] as we have seen, frame their action accordingly, yet creditors and strangers are bound to take notice of such executors only as in fact execute the office. If one only confess a judgment, it seems now settled that it shall not bind nor conclude the rest (^a). If they plead distinct pleas, it is said that shall be received which is best for the estate, or most decisive of the question (^b). Of co-executors, if some are of full age, and others infants, the action may be against them all; but the latter cannot appear with others by attorney, but must appear by guardian (^c).

It is clearly settled, that one executor shall not be charged with the *devastavit* of his companion, and shall be liable only to the extent of the assets which came to his hands (^d), if he has not in any manner contributed to the loss. The testator's having misplaced his confidence in one executor shall not operate to the prejudice of the others (^e). Nor shall one executor be affected by notice to the other, who conceals it from him, of the existence of a superior demand (^f). But if there be notice to one executor, and nothing more appears, he shall, it seems, be presumed to have communicated it to the other (^g).

[473] An executor of an executor shall, as I have already mentioned, pursuant to the stat. 4 & 5 W. & M. o. 24. s. 12, be charged on a *devastavit* committed by his testator, in the same

(y) 3 Bac. Abr. 32. Off. Ex. 95.

(z) 3 Bac. Abr. 33. *Swallow v. Em-*
berson, 1 Lev. 161. S. C. 1 Sid. 242.

(a) Off. Ex. 68. Vid. *supr.* 359, 360.

(b) Off. Ex. 98. 3 Bac. Abr. 33. *Go-*
dolph, 136. *Hudson v. Hudson*, 1 Atk.
460. and vid. *supr.* 359, 360.

(c) 3 Bac. Abr. 13. 619. *Smith v.*
Smith, Yelv. 130. Styl. 318. vid. *Fitz-*
gerald v. Villiers, 3 Mod. 236. *Fres-*
cobaldi v. Kinaston, 2 Stra. 784.

(d) 2 Bac. Abr. 31. Off. Ex. 161, 162.
Godolph. 134. *Hawkins v. Day*, Ambl.
162. *Shep. Touch.* 496. *Littlehales*
v. Gascoyne, 3 Bro. Ch. Rep. 74.
Supr. 430.

(e) *Hargthorpe v. Milforth*, Cro. Eliz. .
318.

(f) *Littlehales v. Gascoyne*, Ambl.
162.

(g) *Ibid.*

manner as such testator would have been, if living^(b). But although, as we have seen⁽ⁱ⁾, an action of debt may be maintained by A, an executor, suggesting a *devastavit* in the lifetime of his testator, on a judgment recovered by such testator against B, also an executor; yet in such case it seems, as against B's executor, a *scire facias* is requisite, inasmuch as he was not privy to the judgment^(k).

It is not enough for the executor of an executor sued for breach of covenant made by the original testator, to plead *plene administravit* of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading *plene administravit* by the first executor; or at least that he, the second executor, had no assets of the first; so as to show that he had no fund out of which any *devastavit* by the first executor could be made good^(l).

An executor *de son tort* is liable to the action of the lawful executor or administrator, or to that of a creditor; and, in the latter case, may be charged as executor generally^(m). If there be also a lawful executor, they may be joined in an action by a creditor or sued severally⁽ⁿ⁾; but it is otherwise if there be a lawful administrator; he cannot be so joined with an executor *de son tort*^(o). If a creditor take out administration, he may recover his debt against him who before the grant was executor *de son tort*, as well as the goods of the intestate taken or converted previously to the same^(p). And if a person act under a power of attorney from one of several executors, who has proved the will, although he cannot be charged as executor *de son tort* during the life of such executor, yet if he continue to act after the death of such executor, he may be charged as exe-

(b) *Vid. Com. Dig. Admon. I. 3. 3*

Bac. Abr. 99. Off. Ex. 259. Holcomb

v. Petit, 3 Mod. 113. Beynon v. Gol-
lins, 2 Bro. Ch. Rep. 324. Vid. supr.

430.

(i) *Supr. 431, 432.*

(k) *Berwick v. Andrews, Salk. 314.*

S. C. Ld. Raym. 971.

(l) *Wells v. Fydell, 10 East, 315.*

(m) *Com. Dig. Admon. C. 1. White-*
hall v. Squire, Carth. 104. Off. Ex.

177. 5 Co. 31.

(n) *Off. Ex. 178.*

(o) *Ibid.*

(p) *Com. Dig. Admon. C. 3. Sti. 384.*

cutor *de son tort*, though he act under the advice of another of the executors who has not proved the will (q).

[474] A party, as we have seen (r), may be an executor *de son tort* of a term, and is chargeable for waste committed by him on the demised premises (s). If an executor *de son tort* be guilty of that, or any other species of *devastavit*, or plead *ne unques executor*, and it be found against him, he shall be charged as another executor *de bonis propriis* (t): But in general cases he is liable only to the amount of the assets which come to his hands (u).

By the stat. 30 Car. 2. c. 7, made perpetual by the stat. 4 & 5 W. & M. c. 24, above referred to, the executor of an executor in his own wrong is chargeable on a *devastavit* by his testator, in the same manner as such testator would have been if living (w).

But it seems that an executor *de son tort* of an executor *de son tort* is not liable for a *devastavit* committed by such first executor, either at common law, or by either of the two last-mentioned statutes (x).

What has been stated in regard to actions against executors, is, in the main, applicable to administrators, whether general or limited. If an administrator *durante minoritate* continue in [475] the possession of the effects after the executor is come of age, he may be sued either by the executor or by a creditor (y). But if such administrator administer in part, and deliver to the executor, on his coming of age, all the residue, he cannot be charged by a stranger (z). If before the executor attain the age of twenty-one, the administrator wasted the assets, he may be charged on the special matter by the executor (a); but subsequent to that period, he is not liable for the *devastavit* at the suit of a creditor. The creditor must re-

(q) Cottle v. Aldrich, 4 Mau. & Sel. 175.

(x) Com. Dig. Admon. I. 3. Andr. 252. 3 Bac. Abr. 100, in note.

(r) Supr. 38.

(y) Com. Dig. Admon. F. 1 Sid. 57.

(s) Mayor of Norwich v. Johnson, 3 Lev. 35. Off. Ex. Suppl. 102.

1 Anders. 34.

(t) Off. Ex. 157.

(z) Brooking v. Jennings, 1 Mod. 174, 175.

(u) Dyer, 166 b. note 11.

(a) Latch. 160.

(w) Vid. Com. Dig. Admon. I. 3.

sort against the executor, who is entitled to his remedy against the administrator (^b).

The executor of a deceased partner and the survivor cannot be jointly sued for a debt due from the partnership, because the former is to be charged *de bonis testatoris*, the latter *de bonis propriis* (^c); but the creditor may proceed against either, who may claim from the other contribution.

But if the executors of a deceased partner continue his share of the partnership property in trade for the benefit of his infant daughter, they are liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt, although their names are not added to the firm, but the trade is carried on by the other partners under the same firm as before, and the executors, when they divide the profit and loss of the trade, carry the same to the account of the infant, and take no part of the profits themselves (^d).

By the stat. 8 Ann. c. 14 (^e), a lessor is empowered to distrain within six calendar months after a lease for life, or for years, or at will, is determined, provided his own title or interest, as well as the tenant's possession, continue at the time of the [476] distress. In case a lessee die before the expiration of a term, and his executor continue in possession during the remainder and after the expiration of it, a distress may be taken for rent due for the whole term (^f).

An executor, it seems, is bound, provided he have assets, to maintain an apprentice till the term is expired; for a distinction exists between a covenant to maintain, and a covenant to instruct an apprentice: The former is a lien on the executor, although not named, in respect of the assets; the latter is a fiduciary trust annexed to the person of the master (^g). But justices of the peace have, generally speaking, no authority to

(^b) 3 Bac. Abr. 14. Latch. 267. 1 Anders. 34. 6 Co. 18 b.

(^c) Hall *v.* Huffam, 2 Lev. 228.

(^d) Wightman *v.* Townroe and others. 1 Mau. & Sel. 412.

(^e) Vid. Com. Dig. Distress. A. 2. 3 Bl. Com. 11.

(^f) Braithwaite *v.* Cooksey & al. 1

H. Bl. Rep. 465.

(^g) Com. Dig. Justices of Peace, B. 57.

4 Bac. Abr. 579. 1 Burn. Just. 82. 1

Const's Bott's P. L. 524. Pl. 745.

Cro. Eliz. 553. Wadsworth *v.* Gye,

1 Sid. 216. Rex *v.* Peck, 1 Salk. 66.

Baxter *v.* Burfield, Stra. 1266. Vid.

supr. 152. 285.

order an executor to maintain an apprentice; for such a jurisdiction would prevent his insisting, by a plea of *plene administration*, on a deficiency of assets as an exemption^(h).

By the custom of London, it is said, the executor is bound to put the apprentice to another master of the same trade⁽ⁱ⁾.

In respect to a parish apprentice, on whose binding no larger [477] sum than five pounds shall have been paid, some specific regulations are, in the event of the master's death, prescribed by the stat. 32 Geo. 3. c. 57, which enacts, that if the master of such an apprentice shall die during the term, the covenant in the indenture for his maintenance shall not continue in force longer than three calendar months after the death of such master, during which the apprentice shall continue to live with and serve the executors or administrators, or with such person as they shall appoint: And in all such parish indentures of apprenticeship there shall be annexed to the covenant for maintenance a proviso, that such covenant shall not continue longer than three calendar months after the death of the master; but if such proviso be omitted, the covenant on the part of the master to maintain the apprentice shall continue only for three calendar months after his death, within which period two justices of the peace where the master died shall, on the application of the widow of such master, or of any son, daughter, brother, or of any executor or administrator of the deceased, by indorsement on the indenture, direct the apprentice to serve another master for the remainder of his term. The statute also makes the same provisions for the death of any subsequent master. It then directs, that if no application be made to two justices within the three months, or if on application they shall not think fit to continue such apprenticeship, the indentures shall be void. It further provides, that the act shall not extend to any parish apprentice not living with nor serving such original or subsequent master at the time of his death. And lastly it enacts, that if the original or any subsequent master, or the personal representative of such master, having assets, during the three months shall refuse or neglect to maintain and

(h) *Pett v. Inhab. of Wingfield, Carth.* 66.

231. *Rex v. Pett, Show. 405. 1 Salk.* (i) *Per Holt, C. J. S. C. 1 Salk.* 66.

provide for such apprentice according to the form of such covenant, two justices, on complaint of the apprentice, or the parish officers, may levy sufficient for the purpose by distress and sale of the effects or assets of such master.

Executors and administrators are within the custom of foreign attachment; and, therefore, if a plaint be entered in the court of the mayor or sheriff of London against an executor or administrator, the plaintiff may attach money or goods belonging to the deceased in the hands of another within the city (^k). But a debt due to the deceased cannot be attached on a plaint against his personal representative, although he be sued under that description, unless he be sued for a debt due from the deceased (^l). Nor shall there be an attachment for the debt of a testator of money or goods in the hands of the executor, unless they were due or belonging to the testator at the time of his death, although they be assets; as if an executor sell the goods of the testator, the money cannot be attached in his hands (^m). Nor, if he take a bond for a debt due to the testator, can the money payable on the bond be attached (ⁿ). Nor if an executor [479] recover damages in trespass for the testator's goods, or on a covenant made with him, can there be an attachment of the damages (^o). Nor, if money be awarded to an executor on a submission by him of controversies between his testator and another person, can the money due by the award be attached (^p). Nor can there be an attachment of a legacy; for creditors have an interest in it, and they are incapable of being warned (^q).

SECT. IV.

Of remedies against executors and administrators in equity.

AN executor or administrator is also, in his representative character, liable to all equitable demands, with regard to per-

(^k) Com. Dig. Attachment, A. B. 3
Bac. Abr. 258. 1 Roll. Abr. 105. vid.

Dy. 196 b. Fisher *v.* Lane, 3 Wils. 297. S. C. 2 Bl. Rep. 834.

(^l) Com. Dig. Attachment, D. Hodges *v.* Cox, Cro. Eliz. 843.

(^m) Horsam *v.* Turget, 1 Ventr. 113.

(ⁿ) S. C. 1 Ventr. 113.

(^o) Ibid. 112.

(^p) Horsam *v.* Turget, 1 Ventr. 112, 113. S. C. 1 Lev. 306.

(^q) 1 Ch. Ca. 257. 1 Roll. Abr. 551.
3 Bac. Abr. 259. Noy. 115.

sonal property, that existed against the deceased at the time of his death. [1]

If, pending a suit, the defendant die, it shall be continued by bill of revivor against his executor (a).

Legatees, or persons in distribution, are also entitled to assert in a court of equity their claims against the executor or administrator, on the principle, that equity considers an executor as a trustee for the legatee in respect to his legacy, and as trustee in certain cases for the next of kin of the undisposed surplus (b). It also regards the administrator as trustee for the parties in distribution (c). And trusts are the peculiar objects of equitable cognizance. Thus a bill lies for a personal legacy; or for a discovery, and an account of assets; or for the distribution of an intestate's personal estate (d). And an administrator cannot avail himself of the length of time as an answer to the plaintiff's bill for an account and application in payment of debts, where he has not pleaded or claimed the benefit of the statute of limitations (e). So it lies for the discovery of assets, merely for the purpose of enabling the plaintiff to maintain an action at law against an executor (f); but not till he has denied assets by his plea to the action (g).

(a) Mitf. 63, 64.

2 Ventr. 362. 2 Ch. Rep. 167.

(b) 4 Bac. Abr. 447. Anon. 1 Atk. 491. Farrington v. Knightley, 1 P. Wms. 544. Wind v. Jekyl, ib. 575. Prac. Reg. 2d edit. 209.

(d) 1 P. Wms. 287. 2 Fonbl. 321. note (d). ibid. 322. Com. Dig. Chan. 3 D. 1.

(c) 2 Fonbl. 322. Matthews v. Newby, 1 Vern. 133, 134. 2 Ch. Ca. 95. Anon.

(e) Cockshutt v. Pollard, 1 Wils. 132. (f) Com. Dig. Chan. 2 G. 3.

(g) Ibid. 3 B. 2.

[1] Where a creditor has a remedy against an executor or administrator *at common law*, he cannot sue in Chancery to establish his demand. *Batchelor v. Elliot's Adm.* 1 Hen. & Munf. 10.

Nor can a simple contract creditor, having obtained a judgment by default against an executor, maintain a suit in equity, for marshalling assets, against devisees of the landed property, until he has fully presented his claim at law against the executor and his securities. *Mason's Devisees v. Peters' Ex'rs.* 1 Munf. Rep. 437.

A judgment by default against executors is *prima facie* admission of assets. *Ibid.*

An executor having admitted a large balance of personal estate to be in his hands, was ordered to pay the whole into court, although he stated that an action at law was depending against him for a debt to a considerable amount from the testator; but with liberty, in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. The plaintiff in the action did recover, and the court ordered the amount to be paid out to him, and not to the executor^(h).

And where an executor admitted a balance due from him to his testator upon an unsettled account, notwithstanding he by his answer stated there were debts owing from the estate to which he was liable to the extent of assets, including that balance, the testator having died three years before, he was ordered to pay the balance into court, as all the debts ought to have been paid⁽ⁱ⁾.

So where executors having personal estate of the testator given to them by the will, upon trust to lay out upon good and sufficient security, for an infant, to be paid on his coming of age, after a decree for an account and notice by the next friend of the infant plaintiff lending a part of such personal estate upon mortgage, they were ordered to pay the same into court; but the motion asking in the alternative, that the executors might be ordered to replace the amount by so much stock as the same would have purchased at the time of the investment, was to that extent refused^(k).

And an executor, by the schedule to his answer, acknowledging that he had received the testator's property, and lent it on a promissory note, was ordered to pay the money into court^(l).

An executor may be also called upon in equity to account for interest he has made of the testator's estate^(m). And he may be charged with interest upon balances, though not prayed by the bill⁽ⁿ⁾.

And although the rule be not invariable, that an executor in

^(h) *Yare v. Harrison*, 2 Cox's Rep. 377.

⁽ⁱ⁾ *Mortlock v. Leathes*, 2 Meriv. 491.

^(k) *Widdowson v. Duck*, 2 Meriv. 494.

^(l) *Vigrass v. Binfield*, 3 Madd. Rep. 62.

^(m) 11 Vin. Abr. 433, in note. *Perkins v. Baynton*, 1 Bro. Ch. Rep. 375.

1 *Binn.* 194.

⁽ⁿ⁾ *Turner v. Turner*, 1 Jac. & Wal. Rep. 39.

all cases shall pay interest for money employed in the course of his trade ; yet if, without any reasonable cause, he detain it for any length of time from the persons entitled, and apply it to the purposes of his trade, or even suffer it to lie idle in his [481] hands, he shall be subject to the payment of interest (o).

In respect to the rate of interest to which in such cases he shall be liable, if he make use of the money, he ought to pay the interest he has made. He ought not to derive any personal advantage from the trust property. If, therefore, it be established in evidence that he used the property in his trade, the court takes it for granted that the trade produced *5l. per cent.* at the least, and it is incumbent upon him to show that he made less. But in case of mere negligence to lay the money out for the benefit of the estate, although it be true that complete indemnity is not attained, unless the executor pay that interest which might have been made, yet that is not the principle on which the court acts. It has laid down a rule in regard to the quantum of interest, namely *4 per cent.*, from which it does not depart without some special reason. And mere negligence is not sufficient to produce an exception : Consequently, if there be no evidence of the executor's having employed the fund, but mere neglect to pay it, he cannot be charged with more than *4 per cent.* interest. And even when an executor mixed the fund with his own money at his banker's, the benefit derived by him not appearing, Lord Thurlow, C. held him chargeable only with interest at *4 per cent.* : Although Lord Loughborough, C. was of opinion, in which Sir William Grant, M. R. in a late case appeared to concur, that if a trader lodge money at his banker's, it answers the purpose of his credit, and it should be held to be an employment in his trade (p). And Sir John Leach, V. C. in a subsequent case, charged an executor with interest at *5 per cent.* who mixed his testator's money at his banker's with his own, receiving only an interest of *3½ per cent.* instead of laying it out for the benefit of the parties entitled (q). But although the court does not usually

(o) *Newton v. Bennet*, 1 Bro. Ch. Rep. 359. *Seers v. Hind*, 1 Ves. jun. 294. *Ashburnham v. Thompson*, 13 Vez. 402. *Fox v. Wilcocks*, 1 Binn. 194. *Callaghan v. Hall*, 1 Serg. & R. 241. (p) *Rocke v. Hart*, 11 Ves. jun. 58. (q) *Harris v. Docura*, April, 1818. MSS.

charge an executor with a greater rate of interest than *4 per cent.* where he has called in the money for purposes of the will, yet if it were outstanding on good security, at the time of the testator's death, at *5 per cent.* and he call it in without any purpose connected with the trust, and hold the whole in his hands without attempting to lay it out, he shall be charged with interest at the rate of *5 per cent.*, on the ground of a general dereliction of duty on his part; and though a small part of the money so called in carried only *4½ per cent.* that will make no difference in his favour (r).

But if a will direct the executor to lend at the best interest a sum of money, which at the time of the testator's death is outstanding at four *per cent.*, and the executor suffer it to continue so, he shall be personally liable to pay five (a). And so if executors be directed to lay out the residue in the purchase of land, or upon heritable or personal securities, at such rate of interest as they should think reasonable, and they lend the fund to one of themselves on bond at *4 per cent.* when *5 per cent.* might have been made by heritable or government securities; the executor borrowing shall pay *5 per cent.*; for in contracting with himself, he cannot spare himself (c). If there be an express trust to make improvement of the testator's estate, and the executor will not honestly endeavour to improve it, he shall be considered as having lent the money to himself on the same terms on which he would have lent it to others; and as often as he ought to have lent it, if it be principal, and as often as he ought to have received it, and lent it to others, if the demand be interest; and consequently he shall be charged with interest upon interest; but in general, the account shall not be taken against him from the moment of the testator's death upon all sums received and paid by him, but some time is fixed, at which the principal is said to be in his hands, so as that it was capable of being laid out; and he is then to be first charged with the principal and with subsequent interest, and for that purpose annual rests in the taking of such accounts are most usual.

(r) *Morley v. Ward*, 11 Ves. jun. 581.
Crackelt v. Bethune, 1 Jac. & Walk.
 Rep. 686.

(a) *Forbes v. Ross*, 2 Bro. Ch. Rep. 429.

(c) *Forbes v. Ross*, 2 Cox's Rep. 113.

But where a testator gave a legacy to his executor in full for his trouble in executing the will, and declared that he should have no commission, nor derive any advantage from keeping any money in his hands without duly accounting for the legal interest thereof; and after providing for the maintenance and education of his children out of the interest of their respective portions, directed that the surplus interest should accumulate for their benefit, and be laid out in the public funds for that purpose; and the executor kept the fund in his hands for a long period of time, without attempting any accumulation; he was held liable to interest at 5 *per cent.* on all the sums of money which came to his hands, from the time he received them respectively, so long as they continued in his hands; and in taking the accounts the master was ordered to make half-yearly rests, for the purpose of charging him with compound interest, (that is to say) by stating the whole amount of the interest which had accrued at the end of each half-year, and adding that to the principal of the next half-year (p).

Nor, in case the executor be expressly directed to improve the estate, shall he be permitted to redeem himself by accounting upon the supposition of the money having been laid out in the public funds, if in point of fact it were not so laid out; or if he laid out the property in the public funds, and then sold out the stock at a great advance, if at the close of the trust the price be less than he sold at, it is not sufficient for him to offer back the stock, but he shall answer for the amount of the money for which he sold it out (q). Upon the same principles, in case of the bankruptcy of an executor having failed to comply with a direction in the will to accumulate the interest, his estate shall be charged with interest at the rate of 5 *per cent.* with rests (r). But an executor shall not be charged with interest on a balance in his hands, which he retained under a misapprehension, for which there was some colour, of his having a right to it (s).

Nor, if an executor compound debts due from the testator,

(p) *Raphael v. Boehm*, 11 Ves. jun. 92. and 13 Ves. jun. 407. *Say's Ex.*

v. *Barnes*, 4 Serg. & R. 116.

(q) *Ibid.* 108.

(r) *Dorford v. Dorford*, 12 Ves. jun. 127.

(s) *Bruere v. Pemberton*, 12 Ves. jun.

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or buy them in for less than their amount, shall he be personally entitled to the benefit of the composition : but other creditors, or the legatees, or the party entitled to the surplus, shall have the advantage of it^(t).

Yet if an executor lend money on real security, which at that time there was no reason to suspect, and afterwards such security prove bad, he shall not be accountable for the loss, any more than he would have been entitled to the produce of it if it had been sufficient^(u). So where A, an executor, paid the assets into the hands of B, his co-executor, with whom the testator was used to keep cash as his banker ; on the failure of B, the court held, that A ought not to suffer for having trusted him, whom the testator trusted in his lifetime, and at his death appointed one of his executors^(v).

So although, generally speaking, if an executor compound [482] or release a debt to the testator, he shall answer for the amount ; still, if he appear to have acted for the benefit of the estate, he shall not be charged^(x).

Formerly an executor could not be compelled of course to secure a future legacy, on the principle that where the testator had thought fit to repose a trust, unless some breach of it were shown, or a tendency to a breach, the court would continue to confide in the same hand : for such a purpose it was necessary to show misconduct on the part of the executor, or his insolvency^(y) : Or, in the case of an executrix, that she had married a person in needy circumstances^(z). But, according to the present practice, where a legacy is payable at a future period, the legatee without any suggestion of an abuse of the trust, or that the fund is in danger, has a right to call upon the executor to have it divided from the bulk of the estate, and secured and appropriated for his benefit, as well where it is contingent, as

(t) 11 Vin. Abr. 433. Anon. 1 Salk. 155. pl. 4.

(u) Brown *v.* Litton, 1 P. Wms. 141. 4 Burn. Eccl. L. 428. Supr. 428.

(w) 4 Burn. Eccl. L. 428. Churchill *v.* Lady Hobson, 1 P. Wms. 243.

(x) 11 Vin. Abr. 432. Blue *v.* Marshall, 3 P. Wms. 381. Vid. supr. 429.

(y) Slanning *v.* Style, 3 P. Wms. 336. 11 Vin. Abr. 426, 427, 428. 432. 3 Bac. Abr. 8. 1 Atk. 505. 3 Atk. 101.

(z) Rous *v.* Noble, 2 Vern. 249.

where it is vested (^a). Annuitants are likewise entitled to the same equity, and to compel the executor to set apart a sufficient fund for the regular payment of their annuities (^b).

[483] An executor is in general personally bound by an admission of assets, express, or implied, as by the payment of interest: but in either case he may be let in to show, why it should not charge him as that the money was deposited in the hands of bankers, who have failed; or that his admission was grounded on a mistake (^c). Such admission is also waived by the plaintiff's proceeding to an account of assets, and procuring a receiver to be appointed (^d).

In case an executor be decreed to pay interest on account of a breach of trust, or because he has neglected to lay money out for the benefit of the estate (^e), he is liable to costs of course (^f). If an executor have acted fraudulently, the court will decree costs against him (^g), although the will direct that his expenses shall be allowed out of the testator's estate (^h). He is also subject to costs in equity, as well as at law, if he has misconducted himself by paying simple contract debts in preference to bond-creditors (ⁱ).

But an executor shall have his costs, although he make a claim, and fail, if it were merely a submission of the point for the opinion of the court (^k).

[484] If two executors or administrators join in a receipt, one only of whom receives the money, equity has been stated to adopt this distinction, that in such case, each is liable for the whole (^l) as to creditors, who are entitled to the full benefit of law, although one of such personal representatives might have

(^a) 4 Bac. Abr. 448. Green *v.* Pigot, 1 Bro. Ch. Rep. 103. Cooper *v.* Douglas, 2 Bro. Ch. Rep. 232. Strange *v.* Harris, 3 Bro. Ch. Rep. 365. Ferrand *v.* Prentice, Ambl. 273. Prac. Reg. 2d edit. 270.

(^b) Slanning *v.* Style, 3 P. Wms. 335.

(^c) Horsley *v.* Chaloner, 2 Vez. 85.

(^d) Wall *v.* Bushby, 1 Bro. Ch. Rep. 484.

(^e) Newton *v.* Bennet, 1 Bro. 11. 362.

Rocke *v.* Hart, 11 Ves. jun. 58.

(^f) Prac. Reg. 2d edit. 210. Seers *v.* Hind, 1 Ves. jun. 294. Sed vid. Ashburnham *v.* Thompson, 13 Vez. 402.

(^g) Reech *v.* Kinnegal, 1 Vez. 126. Horsley *v.* Chaloner, 2 Vez. 85.

(^h) Prac. Reg. 2d edit. 150, 151. Hatherthwaite *v.* Russel, 2 Atk. 126.

(ⁱ) Jefferies *v.* Harrison, 1 Atk. 468.

(^k) Prac. Reg. 2d edit. 152. Rashley *v.* Masters, 1 Ves. jun. 205.

(^l) 3 Bac. Abr. 31.

given an effectual discharge; but that with respect to legatees, or parties claiming distribution, as they have no legal remedy, one executor or administrator shall not be charged merely by joining in the receipt, when the other has received the money: for that the addition of his name is only matter of form, the substantial part is the act of receiving, and is alone regarded in conscience^(m). But this distinction between legatees, or parties in distribution, and creditors, appears to rest on no authority⁽ⁿ⁾. The rule is general, that executors, joining in a receipt, shall all be answerable^(o). It has, indeed, in some instances, been broken in upon^(p), and Sir Richard P. Arden, M. R. denied it to be universally applicable^(q). It seems an exception, if an executor receive the money without the consent of his co-executor, and they afterwards sign the receipt^(r), for by that act they did not enable him to obtain the [485] payment. So if one executor places the property in the hands of the other, who happens to be a banker, or in such a situation that the act is not improvident; he shall not be charged in case of a loss, for if he had been a sole executor, and had under the same circumstances deposited the money with a banker, he would not have been liable^(s).

This, however, is clear from all the cases, that, where by any act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had enabled to receive it^(t). Therefore where executors joined in a transfer of stock to a co-executor,

^(m) Churchill *v.* Hopson, 1 Salk. 318.

S. C. 1 P. Wms. 241. 1 Eq. Ca. Abr. 398. Murrell *v.* Cox, 2 Vern. 570.

Appeal of Brown's Ex. 1 Dall. 311.

⁽ⁿ⁾ Sadler *v.* Hobbs, 2 Bro. Ch. Rep. 117. 1 P. Wms. 243, in note. 3 Bac. Abr. 31, in note.

^(o) Fellowes *v.* Mitchell, 1 P. Wms. 81. Aplyn *v.* Brewer, Prec. Ch. 173. Leigh *v.* Barry, 3 Atk. 584. Ex parte Belchier, Ambl. 219. Sadler *v.* Hobbs, 2 Bro. Ch. Rep. 116.

^(p) Churchill *v.* Hopson, 1 Salk. 318. S. C. 1 P. Wms. 241. 1 P. Wms. 83.

note (1).

^(q) Scurfield *v.* Howes, 3 Bro. Ch. Rep. 94.

^(r) 1 P. Wms. 241, note 1. 83, note 1. Read *v.* Truelove, Ambl. 417. Sadler *v.* Hobbs, 2 Bro. Ch. Rep. 114. Scurfield *v.* Howes, 3 Bro. Ch. Rep. 90. Hovey *v.* Blakeman, 4 Ves. jun. 596. Westley *v.* Clarke, 1 Eden's Rep. 357. ^(s) Chambers *v.* Minchin, 7 Ves. jun. 197, 198.

^(t) 1 P. Wms. 241, note 1. 3 Bro. Ch. Rep. 97. Doyle *v.* Blake, 2 Scho. & Lef. 231.

upon a representation that it was required for debts, and he wasted part of the produce, they were charged with the whole, that they could not prove the application of to that purpose (^a).

Co-trustees are in this respect contradistinguished from co-executors. In the case of co-trustees, as each hath not a power over the whole of the fund, their joining in a receipt is necessary, and, consequently, although they join in such receipt, yet it is a general rule that the trustee, who receives the money, shall be alone chargeable. But in the case of co-executors, each has a power over the fund, and a co-executor joining in a receipt is altogether unnecessary, therefore, if he act without necessity, and join with his co-executor in such receipt, he shall in general be responsible for the consequences: He as [486] sumes a power over the property, and it shall not be afterwards permitted to him to say, that he had no control over it (^b). So if executors, confiding in the representation of their co-executor, that stock standing in the testator's name is wanting for the payment of debts, do join in a transfer of the stock to him, if he misapply the whole, or any part of it, they are chargeable with him to the extent of such misapplication (^c). In like manner, if an executor has been dealing with the assets much beyond that period of time, in which, in the ordinary course, debts would be paid, and he applies to his co-executors to have such fund transferred to him alone, and on inquiring, they satisfy themselves, that there are debts unpaid, and his real purpose were to apply the fund in discharge of such debts, if it afterwards appear, that he had in his hands another fund sufficient for the payment of those debts, and such application of the fund was not necessary, nor was it in fact devoted to the payment of debts, they shall be responsible. They are in such case, subject to the imputation of negligence in being too easy with their co-executor; too remiss in not inquiring how, for so long a time, he had been acting in the administration of the assets (^d).

(^a) *Lord Shipbrook v. Lord Hinchingbrook*, 16 Ves. jun. 477. *Underwood v. Stevens*, 1 Merl. Rep. 713. 1 Dall. 311, *contra*.

(^b) *Chambers v. Minchin*, 7 Ves. jun. 186. *Brice v. Stokes*, 11 Ves. jun.

323, 324.

(^c) *Lord Shipbrook v. Lord Hinchingbrook*, 11 Ves. jun. 252. 16 Ves. 478.

(^d) *Lord Shipbrook v. Lord Hinchingbrook*, 11 Ves. jun. 254.

But within a reasonable time, if executors, after the testator's death, join in a transfer of stock to their co-executor, on his representation, that it is requisite for the payment of debts : they are not responsible if they can prove he applied it to that purpose, although he had possessed, if not by their means, other part of the assets which he had wasted (^a). And though it be a settled rule, that if any executor contribute in any way to enable the other to obtain possession of the assets, he shall be answerable for their misapplication ; yet the rule does not extend to those cases, in which an executor is merely passive, and does not obstruct the other in receiving the property, for it is not incumbent upon one executor by force to prevent its getting into the hands of his co-executor (^b).

So a co-executor, who proved, but never acted, having received a bill by the post on account of the estate, and transmitted it immediately to the acting executor, was held not to be responsible for the administration of the property (^c). So if A, interested in the fund, act in authorizing B one executor to part with it to C his co-executor, and it be wasted, B shall not be responsible to the extent of A's interest: But B shall be responsible to the other parties, who may be interested in the fund, in case they did not acquiesce in his transferring it to C (^d).

Although one executor admit assets, an account shall be decreed against his co-executor, who does not admit them (^e). And where an infant legatee filed a bill for an account against two executor's, although one of them in his answer denied having either proved the will, or received any assets, the account was directed against both (^f).

If an executor under the express authority of the will carry on trade with the testator's general assets, not only such assets, but even his own property will be subject to his bankruptcy.

If the trade be beneficial, the profits are applicable to the purposes of the will, and the executor derives no personal benefit from the success of the trade. If the trade prove a losing

(^a) *Ibid.* 254.

(^c) *Com. Dig. Chan.* (2 G. 3) Norton

(^b) *Langford v. Gascoigne*, 11 Ves. jun. 383.

v. *Turville*, 2 P. Wms. 145. *Wall v. Bushby*, 1 Bro. Ch. Rep. 488.

(^e) *Balchen v. Scott*, 2 Ves. jun. 678.

(^f) *Price v. Vaughan*, 2 Anstr. Rep. 524.

(^d) *Brice v. Stokes*, 11 Ves. jun. 319.

concern, the executor, on a failure of the assets, will be personally liable to the loss (^f).

[487] If an executor, without any authority from the will, take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy ; the testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests : And with respect to such of the assets as can be specifically distinguished to be part of the testator's estate, they will not pass by the assignment of the commissioners ; the executor holding them *alieno jure*, they will not be liable to his bankruptcy (^g).

But the testator may by his will qualify the power of his executor to carry on trade, and may limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose ; and then, in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation (^h).

If the executor of a trader only dispose of the stock in trade, it will not make him a trader, or subject to a commission of bankruptcy. Thus, where the executor of a wine-cooper found [488] it necessary to buy wines to refine the stock left by the testator, this was held not to constitute him a trader (ⁱ).

If an executor become a bankrupt, his bankruptcy does not divest him of his legal right of executorship, nor does the commissioners' assignment affect the assets, except in regard to such beneficial interest, as the bankrupt himself may be entitled to. But, although a bankrupt executor may strictly be the proper hand to receive the assets, if his assignees be possessed of any part of the property, the Court of Chancery will, for the benefit of creditors and legatees, appoint a receiver for the same ; or will direct the bankrupt himself to be admitted a

(^f) *Callaghan v. Hall*, 1 Serg. & R. 241.

edit. 268.

(^g) See *ex parte Garland*, 10 Ves. jun. 110. Supr. 166. & Cooke's B. L. 4th edit. 67. and Whitmarsh's B. L. 2d edit. 16.

(^h) *Ex parte Garland*, 10 Ves. jun. 110.

(ⁱ) Cooke's B. L. 4th edit. 67. and Whitmarsh's B. L. 2d edit. 16.

creditor for what he shall be indebted to the estate; nor is this practice incongruous, as he acts in *auter droit*. Yet to prevent embezzlement, the court, on such proof, will order the dividends to be paid into the Bank, subject to the demands on the testator's estate (^k). So where A a bankrupt, and also B claimed to be executors of a creditor of A, and a suit was pending in the ecclesiastical court in regard to the executorship; the Lord Chancellor permitted B to prove the debt under the com-[489] mission, and directed the dividends to be paid into the Bank, to abide the event of the litigation (^l). And where an executor, in consequence of his bankruptcy becomes destitute, and incapable of exercising his functions, and elects to relinquish his interest in the testator's property, the court of Chancery will permit a creditor of the testator to file a bill for himself, and to call in the outstanding assets for the purpose of administering them (^m). And a receiver has been appointed before answer upon an affidavit of misapplication and danger to the property in the hands of an executor, and the co-executor's consenting to the order (ⁿ).

An executor being out of the jurisdiction in Scotland, a receiver was appointed under the 36 Geo. 3. c. 90, but administration having been granted, a motion was made on the part of the administrator for an injunction to restrain the receiver from acting. The Lord Chancellor referred it to the master to reconsider the appointment of a receiver, regard being had to the circumstance of administration having been granted (^o).

(^k) Cooke's B. L. 133, 134, 135. 137. Stone, 131. Ex parte Ellis, 1 Atk. 101. Ex parte Butler, ib 213. Butler v. Richardson, Ambl. 74. Ex parte Markland, 2 P. Wms. 546. Ex parte Leek, 2 Bro. Ch. Rep. 596. Vid. also supr. 429. and Whitmarsh's B. L. 2d edit. 269.

(^l) Ex parte Shakeshaft, 3 Bro. Ch. Rep. 198.

(^m) Burroughs v. Elton, 11 Ves. jun. 29.

(ⁿ) Middleton v. Dodswell, 13 Ves. 266.

(^o) Faith v. Dunbar, Coop. Rep. 200.

SECT. V.

Of remedies against executors and administrators in the ecclesiastical court.

LEGATEES, and the next of kin may proceed against the executor or administrator in the ecclesiastical court. That court has not only jurisdiction over the probate of wills, and the granting of administrations, but has also, as incident to the same, authority to enforce the payment of legacies^(a); and, according to the statute, the distribution of an intestate's effects. In respect to legacies, the cognizance of them in former times belonged exclusively to that judicature. The Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees^(b). In regard also to distribution, equity, as the act of parliament contains no negative words, has a concurrent jurisdiction with the ordinary, [490] and in both cases, as being armed with larger powers, affords a more effectual relief^(c).

As a court of equity, and the spiritual court have in these points a concurrent jurisdiction, whichever of them has first possession of the cause, has a right to proceed^(d). But where it appears that the ordinary cannot administer complete justice, equity, without regard to such priority, will interpose. As, where a husband sues in the spiritual court for a legacy bequeathed to the wife, the Court of Chancery will grant an injunction to stay the proceedings, since the ecclesiastical judge has no authority to compel a settlement^(e). So a legacy given to an infant is more properly cognizable in equity, since that jurisdiction can alone secure the money for the child's benefit^(f).

(^a) 4 Bac. Abr. 446. 3 Bl. Com. 98.

(^b) Deeks v. Strutt, 5 Term Rep. 692. See 1 P. Wms. 575.

(^c) Vid. 2 Fonbl. 2d edit. 414, note

(^d) Matthews v. Newby, 1 Vern. 134.

(^e) 4 Bac. Abr. 447. Toth. 114. Nicholas v. Nicholas, Prec. Ch. 548.

(^f) Hill v. Turner, 1 Atk. 516. Jesson v. Moulson, 2 Atk. 420. Nicholas v. Nicholas, Prec. Chan. 548. 2 Ves. jun. 676. Meales v. Meales, 5 Ves. jun. 517, in note. See also 10 Ves. jun. 577. & supr. 321.

(^f) Howell v. Waldron, 1 Vern. 26. Anon. 1 Atk. 491.

The spiritual jurisdiction extends to legacies only of personal property ; therefore, if land be devised to be sold for the payment of legacies, they can be sued for only in a court of equity, because they arise out of the real estate (^g). Equity has also the exclusive cognizance of those cases in which there is a will, and the residue is undisposed of ; for then as we have seen (^h), [491] the executor is a trustee for the residue, and the ordinary cannot compel a distribution of it, because he cannot enforce the execution of a trust (ⁱ). Nor has he a power to compel the debtor of an intestate to pay his debt into court, although such debtor be the person applying for a distribution, for that would be to hold a plea of debt ; but in that case he may refuse to proceed to a distribution till the party shall bring it in (^k). So, it seems, that if a legatee take a bond from the executor for payment of the legacy, and afterwards sue him in the spiritual court for the same, a prohibition will be granted ; for by taking the obligation the nature of the demand is changed, and becomes a debt recoverable in the temporal courts (^l).

In case a legatee, or the next of kin elect to sue in the spiritual court, the executor or administrator must there exhibit an inventory of the property, if he has not done so before, and bring in an account (^m).

Of the nature of an inventory I have already treated (ⁿ). It is to contain a full, true, and perfect schedule of the deceased's [492] effects. The account is to state in what manner they have been disposed of (^o).

Neither an executor nor an administrator can be cited by the ordinary *ex officio* to account (^p). The executor, we have seen, is bound by his oath to make an inventory of the person-

(^g) 4 Bac. Abr. 446. Dyer, 151. Palm. 120. Cro. Jac. 279. 364. Cro. Car. 16. 2 Roll. Abr. 285. Bastard *v.* Stockwell, 2 Show. 50.

(^h) Supr. 351. 479.

(ⁱ) 2 Fonbl. 2d edit. 414, note (d) ad fin. Petit *v.* Smith, 5 Mod. 247. Hatton *v.* Hatton, Stra. 865. Petit *v.* Smith, Ld. Raym. 86. Rex *v.* Raines, ib. 363. Farrington *v.* Knightly, 1 P. Wms. 546, 547. 549.

(^k) Clerke *v.* Clerke, Ld. Raym. 585.

(^l) Goodwyn *v.* Goodwyn, Yelv. 38. Luke *v.* Alderne, 2 Vern. 31. Sed Dodderidge, J. contr. 2 Roll. Rep. 160. vid. Sadler *v.* Daniel, 10 Mod. 21.

(^m) 4 Burn. Eccl. L. 425.

(ⁿ) Vid. supr. 247. et seq.

(^o) Greerside *v.* Benson, 3 Atk. 252.

(^p) Com. Dig. Admon. C. 3. Archbp. of Canterbury *v.* Wills, 1 Salk. 315, 316. Greerside *v.* Benson, 3 Atk. 253.

al estate, and exhibit the same into the registry of the spiritual court at the time assigned him for that purpose, and render a just account, when lawfully required, that is to say, at the suit of a legatee ; and in such case he is bound not only to produce an account, but also to prove the different items of it^(q).

The payment of sums under forty shillings shall be proved merely by his oath, if there appear no fraud by dividing greater sums into less. Of the payment of sums to a higher amount, vouchers must also be exhibited^(r). The adverse party shall be at liberty to disprove such account. If it be false, the executor shall be liable to the penalties of perjury^(s).

After the death of an executor, sums under forty shillings shall not be allowed on the oath of his representative ; for such payments can be substantiated only by him who made them^(t).

[493] In regard to the administrator, before the statute of distribution, according to the condition of the administration bond, he also was bound to exhibit an inventory, and render an account when required. But pursuant to that statute the administrator, we may remember, enters into a bond with two or more sureties, conditioned for his exhibiting an inventory of the effects, and an account of the same, at the respective times specified. Therefore, without citation or suit, he ought, in strictness, to appear on the day, and produce his account in court. But, in that case, it is neither verified by oath, nor liable to be examined. If, however, a party in distribution, who is in the nature of legatee by statute, and therefore entitled to an account, shall come in and controvert it ; it must be sworn to, and is subject to investigation ; when the proceedings shall be the same as in the case of an executor^(u).

Thus it appears that the stat. 1 Jac. 2. c. 17^(w), which provides that no administrator shall be cited according to the statute of distributions to render an account of the personal estate of his intestate otherwise than by inventory, unless at the instance or prosecution of some person in behalf of a minor, or

^(q) Archbp. of Canterbury *v.* Wills, 1 Salk. 316. vid. also Archbp. of Canterbury *v.* House, Cowl. 141.

^(r) 4 Burn. Eccl. L. 427. Ought. 347, 348.

^(s) 4 Burn. Eccl. L. 427. Ought. 346.

^(t) 4 Burn. Eccl. L. 427. Ought. 347.

^(u) Archbp. of Canterbury *v.* Wills, 1 Salk. 315, 316.

^(w) Vid. 4 Burn. Eccl. L. 426.

having a demand out of such personal estate, as a creditor, or next of kin, nor be compellable to account before the ordinary ; had, in truth, no operation, as such was the law before (x).

[494] All the legatees, or parties in distribution, are to be cited to appear at the making of the account ; for it shall not be conclusive on such as shall be absent, and have not been cited (y). An executor or administrator, therefore, when he is called upon by any one party to account, should cite the legatees, or next of kin in special, and all others in general, having, or pretending to have, an interest, to be present, if they think fit, at the passing of the same ; and then, on their appearance, or contumacy in not appearing, the judge shall proceed (z). [1]

(x) Archbp. of Canterbury *v.* Wills, 1 s. 20.

Salk. 315, 316.

(z) 4 Burn. Eccl. L. 426. Ought. 354,

(y) 4 Burn. Eccl. L. 426. Swinb. p. 6. 355, 356.

[1] In Pennsylvania, the executor or administrator settles, on oath, his account with the Register, either voluntarily or at the command of the Orphan's Court. By the Act of April 4th, 1797, it is made the duty of the Register, upon the account being filed in his Office, to give notice to the legatees and creditors, by advertisement put up in at least three of the most public places in the county, and published in two newspapers once a week for four weeks, that the executor or administrator has filed his account, and that it will be presented to the Orphan's Court on a day certain, (at least thirty days after publication of notice,) for confirmation and allowance. On the day fixed, the accounts are confirmed *nisi*, unless there be exceptions filed on or before the next stated Orphan's Court day. If exceptions be filed, auditors are appointed, who hear all parties interested, and report to the Court : their report is either excepted or submitted to ; if the former, the exceptions are argued before the Court, from whose judgment thereon an appeal lies to the Supreme Court, where the decision is final.

Upon the final settlement of the accounts, the Court may, if the estate be insolvent, appoint auditors to apportion the assets among the creditors, in their legal order ; or if the debts have been paid, the Court may direct distribution among the legal representatives of an intestate ; and their order may be enforced by attachment, or serve as a foundation for a suit at law. And a party interested in the accounts of an executor or administrator may obtain a lien upon his real estate for the balance appearing due on settlement, by filing a transcript of the amount with the Prothonotary of the Common Pleas.

If the administrator neglect or refuse to file an inventory or settle an account, an action may be brought upon his bond. *Selectmen of Boston v. Boylston*, 6 Mass. Rep. 318 9 Mass. Rep. 337.

The administration account of an executor or administrator, in which he has charged himself with the amount of the inventory, is *prima facie* evidence only

Although the spiritual court have, as incident to the jurisdiction of wills, the jurisdiction also of legacies; yet, if a temporal matter be pleaded in bar of an ecclesiastical claim, they must proceed according to the common law (^a). Therefore, if payment be pleaded in bar of a legacy, and there be but one witness, whom the ecclesiastical court will not admit, because their law requires two witnesses, a prohibition shall issue (^b). But it is not a sufficient ground for a prohibition to suggest, that the plaintiff had only one witness to prove the fact, unless the party allege he offered such proof, and it was refused for insufficiency (^c).

If the spiritual court shall attempt a distribution contrary to the rules of the common law, it shall be prevented by a prohibition, because it is restricted by the statute of distribution to those rules (^d).

(^a) 4 Bac. Abr. 447. 1 Roll. Abr. 298,
299. Hob. 12. 12 Co. 65. Hetley, 87.
2 Inst. 608. Sid. 161.

(^b) Bagnall *v.* Stokes, Cro. Eliz. 88.
666. Shatter *v.* Friend, Show. 158.
173. Richardson *v.* Disborow, Ventr.
291. Shatter *v.* Friend, 3 Mod. 283.
Breedon *v.* Gill, 1 Ld. Raym. 220.

Cook *v.* Licence, 346. Startup *v.*
Dodderidge, 2 Ld. Raym. 1161. 1172.
1211. Shatter *v.* Friend, 2 Salk. 547.
S. C. Carth. 142. Blackborough *v.*
Davis, 1 P. Wms 47. 49.

(^c) Carth. 143, 144.

(^d) Blackborough *v.* Davis, 1 P. Wms.
49.

of assets to that amount; for if, by any inevitable accident, a part of the articles inventoried should be lost, without his default, or if, in a sale at auction, fairly conducted, the real value or proceeds of the property should be found to be less than the appraisement, the loss or difference will be allowed in the adjustment of the account; or these circumstances may be given in evidence, to repel a charge of waste. *Weeks v. Gibbs*, 9 Mass. Rep. 74.

If, by default of the executor or administrator in not collecting the personal estate, or in not applying it to pay debts, the lands be taken from the devisee or heir, the executor or administrator is liable, in an action for waste, to the devisee or heir who is injured by the waste. *Mitchel v. Lunt*, 6 Mass. T. R. 654. But no such action lies against an executor *de son tort*, for such cause; for he has no authority to collect the effects of the deceased. *Ibid.*

An executor or administrator of a person who at his death had his home and domicil in a foreign country, is holden, by his administration bond, to account to the judge of probate here (Massachusetts) granting the administration, for all property received by him within the state; but for a final settlement and distribution of the estate, he is accountable only to the jurisdiction where the deceased dwelt or had his home at the time of his decease. *Dawes v. Boylston*, 9 Mass. T. R. 337. 4 Ib. 318. 2 Ib. 384. *Stevens v. Gaylord*, 11 Ib. 256.

[495] After the investigation of the account, if the ordinary find it true and perfect, he shall pronounce for its validity. And in case all parties interested as above mentioned have been cited, such sentence shall be final, and the executor or administrator shall be subject to no farther suit (^e).

In case there shall appear assets for the entire, or partial payment of the legacy, or for a distribution, the same shall be decreed accordingly.

An executor or administrator is also bound to exhibit an account upon oath, at the promotion of a creditor; but a creditor is not permitted to call for vouchers, nor to offer any objections to the account; in respect to him the oath of the party is at once conclusive: For such litigation would be altogether fruitless, since the spiritual court has no authority to award the payment of a debt (^f).

The object of a creditor in suing for an account in the spiritual court is to gain some insight into the state of the fund, previously to his proceeding in an action at common law; but a bill in equity for a discovery of the assets is the more usual, as it is the more effectual remedy (^g).

Yet a creditor, as well as the next of kin, has a right *ex debito justitiae*, to an assignment by the ordinary of the administration bond, and to sue in the name of the ordinary, as well the sureties as the principal, showing for breach the administrator's not exhibiting a true inventory, or account (^h). But a creditor has no right in such case to assign for breach the non-payment of his debt, or a *devastavit*, for the words of the condition, "he is well and truly to administer," are construed to apply merely to the bringing in of a true inventory, and account, and not the payment of the intestate's debts (ⁱ). [2]

(^e) 4 Burn. Eccl. L. 428. Swimb. p. 6. Cowp. 140. Vid. 2 Fonbl. 414. 2d s. 21. edit. note (^d). 11 Mass. T. R. 114.

(^f) Vid. Noy 78.

(^g) Vid. supr. 479 489, 490.

(^h) Gree. side v. Benson, 3 Atk. 248. Archbp. of Canterbury v. House,

Cowp. 140. Vid. 2 Fonbl. 414. 2d

edit. note (^d). 11 Mass. T. R. 114.

(ⁱ) 4 Burn. Eccl. L. 428. 430. Lutw.

882. Archbp. of Canterbury v. Wills,

1 Salk. 315, 316. Com. Dig. Admon.

C. 3

[2] If an executor or administrator neglect or refuse to pay a debt after it has been ascertained by a judgment of Court, or by commissioners, it is a breach of the condition of his administration bond. *Cony v. Williams & al.* 11 Mass. Rep. 114. *Tard v. Lea's Ex.* 3 Yeates, 345.

An executor or administrator shall be allowed in the spiritual court all his reasonable expenses, the rule in respect to which is, that he shall receive no profit, nor incur any loss^(k). A party, having an interest, who prays an account, shall not be condemned to costs, unless he make objections to it, which he fails to substantiate^(l).

A legacy may be recovered in the spiritual court against an executor of his own wrong^(m).

Legatees may file a bill in chancery for an account against the executor, and, at the same time, call upon him in the prerogative court to exhibit an inventory⁽ⁿ⁾.

[497] So where a suit is pending in the ecclesiastical court in regard to the probate of a will, or right of administration, a bill in chancery will lie by a party interested for an account of the personal estate, on the ground, that the ecclesiastical court has no means of securing the effects in the interim^(o). And the court will protect the property by appointing a receiver^(p).

The ecclesiastical court cannot entertain a suit for proctors' fees, since they are a temporal duty, for which an action may be maintained in the temporal courts^(q).

^(k) 4 Burn. Eccl. L. 428. Lind. 178.

^(l) 4 Burn. Eccl. L. 428. Floy. 38.

^(m) 4 Bac. Abr. 448. 1 Roll. Abr. 919.

⁽ⁿ⁾ 11 Vin. Abr. 427. 3 Chan. Rep. 72.

^(o) Wright v. Bluck, 1 Vern. 106.

Dulwich College v. Johnson, 2 Vern. 49.

Phipps v. Steward, 1 Atk. 285.

2 Bro. P. C. 476. Morgan v. Harris,

2 Bro. Ch. Rep. 121.

^(p) Atkinson v. Henshaw, 2 Ves. &

Bea. 85. Ball v. Oliver, ib. 96.

^(q) 2 Burn. Eccl. L. 239. Com. Dig.

Prohibition (F.5.) Pollard v. Gerrard,

Ld. Raym. 703. S. C. 1 Salk. 333.

Horton v. Wilson, 1 Mod. 167. John-

son v. Lee, 5 Mod. 238. Skin. 589.

Bunb. 70. Pitts v. Evans, 2 Stra. 1108.

Dougl. 629.

Executors who have given bond with surety to the judge of probate for the faithful performance of their trust, are jointly liable, as principals, to indemnify the surety who has been subjected for the default of one of them. *Babcock v. Hubbard & al.* 2 Connecticut Rep. 536.

A, B, C, and D, being joint executors, the three former signed a probate bond, which E, at the sole request of A, and expecting to look to A only for indemnity, signed as surety. Afterwards, D signed the bond as principal. Held, that the act was a recognition of E as D's surety, and was equivalent to a request. *Ibid.*

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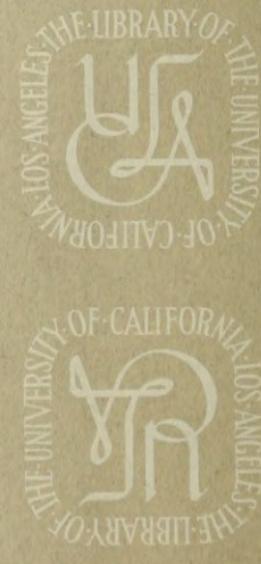
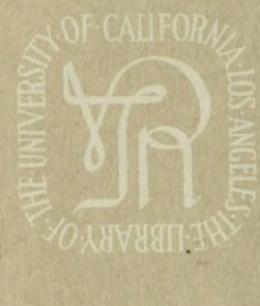
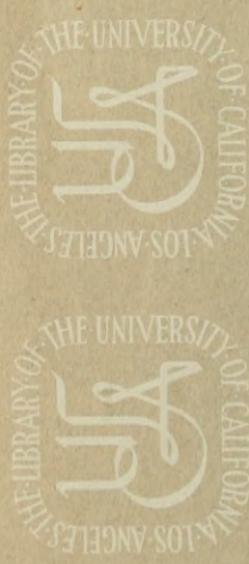
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